SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

ORIGINAL, No. ——. IN EQUITY.

THE STATE OF LOUISIANA, PLAINTIFF,

v.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR OF THE UNITED STATES, AND RICHARD A. BALLINGER, COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS.

Comes now the State of Louisiana, by its Attorney-General, Walter Guion, and moves the court that the State of Louisiana be permitted to file its bill of complaint in equity against James Rudolph Garfield, Secretary of the Interior of the United States, a citizen of the State of Ohio, and Richard A. Ballinger, Commissioner of the General Land Office of the United States, a citizen of the State of Washington, as a cause of which this court has original jurisdiction under section 2, Article III, of the Constitution of the United States, and that upon the filing thereof a subpœna issue as provided by Rule 12 of the Rules of Practice in Equity.

THE STATE OF LOUISIANA,
By WALTER GUION,
Attorney-General.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

ORIGINAL, NO. ———. IN EQUITY.

THE STATE OF LOUISIANA, *Plaintiff*,

v.

JAMES RUDOLPH GARFIELD, *Secretary of the Interior of the United States, and* RICHARD A. BALLINGER, *Commissioner of the General Land Office, Defendants.*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States, Sitting in Equity:

The State of Louisiana by its Attorney-General, Walter Guion, by leave of the court first had and obtained, files this its bill of complaint against James Rudolph Garfield, Secretary of the Interior of the United States, and Richard A. Ballinger, Commissioner of the General Land Office of the United States. Thereupon your orator complains and shows unto the court as follows:

I.

That the State of Louisiana is one of the States of the American Union and a sovereign State of the United States. The defendant James Rudolph Garfield is Secretary of the Interior of the United States and a citizen of the State of Ohio, and the defendant Richard A. Ballinger is Commissioner of the General Land Office of the United States and a citizen of the State of Washington.

II.

That by an act approved March 2, 1849 (9 Stats., 352), entitled "An act to aid the State of Louisiana in draining

the swamp lands therein," the Congress of the United States enacted as follows:

"SECTION 1. That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands which may be or are found unfit for cultivation shall be, and the same are hereby granted to that State.

"SEC. 2. *And be it further enacted*, That as soon as the Secretary of the Treasury shall be advised, by the Governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of same to be made out and certified by the deputies and surveyor-general, to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.

"SEC. 3. *And be it further enacted*, That in making out a list of these swamp lands, subject to overflow and unfit for cultivation, all legal subdivisions, the greater part of which is of that character, shall be included in said list; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom: *Provided, however*, That the provisions of this act shall not apply to any lands fronting on rivers, creeks, bayous, water-courses, &c., which have been surveyed into lots or tracts under the acts of third March, eighteen hundred and eleven, and twenty-fourth May, eighteen hundred and twenty-four; *And provided, further*, That the United States shall in no manner be held liable for any expense incurred in selecting these lands and making out the lists

thereof, or for making any surveys that may be required to carry out the provisions of this act."

III.

That at the time of the enactment of said act of March 2, 1849, the following lands in the State of Louisiana were swamp and overflowed lands unfit for cultivation, to wit:

West part of section twenty-seven, all of section twenty-eight, lot one of section thirty-one, lot four of section thirty-one, the southwest quarter of section thirty-one, northeast quarter of southeast quarter of section thirty-one, southwest quarter of southeast quarter of section thirty-one, all of section thirty-two, all of section thirty-three, the west part of section thirty-four, all in township fourteen south of range fifteen west;

The west part of section two, the west part of section three, the west part of section eleven, the west part of section fourteen, the west part of section twenty-three, the west part of section twenty-four, and the west part of section twenty-five, all in township fifteen south, range fifteen west;

Section thirty-six, township fourteen south, range sixteen west;

All of section one, all of section two, all of section thirteen, all of section eleven, all of section twelve, all of section twenty-four, all of section twenty-five, all in township fifteen south, range sixteen west, aggregating six thousand four hundred and ninety-seven and forty one-hundredths acres.

IV.

That at the time of the enactment of said act of March 2, 1849, none of said lands were held or claimed by individuals nor were any of them lands fronting on rivers, creeks, bayous, water-courses, &c., which had been surveyed into lots or tracts under the act of March third, eighteen hundred and eleven, and of twenty-fourth May, eighteen hundred and twenty-four, or under either of said acts.

V.

That subsequently to the enactment of said act of March 2, 1849, to wit, on December 7, 1850, and acting under the authority of its provisions, the surveyor-general of Louisiana reported to the General Land Office of the United States, with his approval, a certain list prepared in accordance with the rules and regulations then existing, and known and designated as swamp land list No. 4, Opelousas land district, Louisiana, the same constituting and embracing swamp and overflowed lands unfit for cultivation, and being by said list claimed as inuring to the State of Louisiana under said act of Congress approved March 2, 1849, and including among the tracts so selected and certified by said surveyor-general the particular tracts of land specified and described in paragraph three of this bill, as to which said tracts said Surveyor-General reported that they were "subject to a military reservation," meaning thereby the Fort Sabine Military Reservation, theretofore established by order of the President of the United States dated December 20, 1838.

VI.

That on May 4, 1852, the Commissioner of the General Land Office, acting on said swamp land list No. 4, addressed a communication to the Secretary of the Interior—the Secretary of the Interior by operation of law having succeeded the Secretary of the Treasury in the execution of said act of March 2, 1849—recommending that said list of lands, in so far as it embraced lands or tracts which had theretofore been reserved by proclamation of the President for military, naval, or other purposes, be "suspended for further examination and adjudication"; which said recommendation was, under date of May 5, 1852, acceded to by the Secretary of the Interior.

VII.

That by executive order issued March 25, 1871, under the provisions of the act of Congress approved February 24, 1871 (16 Stat., 430), the Fort Sabine Military Reservation, in the State of Louisiana, was formally abandoned.

VIII.

That such "further examination and adjudication" as to the tracts of land specified and referred to in paragraph three of this bill was not had until September 13, 1893, on which date the Commissioner of the General Land Office held the claim and title of the State of Louisiana to the lands for rejection on the ground that they, being within the Fort Sabine Military Reservation, were not granted to the State of Louisiana by the act of March 2, 1849, aforesaid, or by that of September 28, 1850 (known as the general swamp land grant to the several States), and because the said act of February 24, 1871 (16 Stat., 430), under authority of which the Fort Sabine Military Reservation was abandoned, provides for the disposition of lands in abandoned military reservations in a specified way or manner.

IX.

That, the State of Louisiana having duly appealed to the Secretary of the Interior from the said decision and action of the said Commissioner of the General Land Office, the said Secretary of the Interior announced his conclusion thereon in a decision dated October 31, 1895 (21 Land Decisions, 357), wherein, among other things, he decided and instructed the Commissioner of the General Land Office as follows:

> "Did Congress by the swamp land acts of 1849 or 1850 grant to the State of Louisiana swamp lands within the boundaries of Fort Sabine Military Reservation?

"That question is now plainly brought before me by the pending appeal. I decide it in the affirmative.

"I am of opinion that the acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519), granted to the State of Louisiana all of the 'swamp and overflowed lands made unfit thereby for cultivation,' lying within the Fort Sabine Military Reservation as established by the President's executive order of December 20, 1838, subject, however, to the right of the United States to use the same for military purposes during pleasure, or so long as might be necessary in the judgment of the military authorities; and that when said military reservation was abandoned by operation of the act of February 24, 1871 (16 Stat., 430), the title and right of possession of the State of Louisiana under the acts of 1849 and 1850 aforesaid attached at once in fee simple to the swamp and overflowed lands embraced within said reservation. The act of 1871 aforesaid cannot be construed as intending to make any disposition of said swamp and overflowed lands inconsistent with the title previously granted to the State of Louisiana as aforesaid (Wilcox *v.* McConnell, 13 Peters, 513, and Leavenworth R. R. Co. *v.* United States, 92 U. S., 741; Hastings and Dakota R. R. Co. *v.* Whitney, 132 U. S., 357-360).

"Your office decision is hereby reversed. The tracts of land hereinbefore specified and described will be certified to the State of Louisiana under the swamp land grants."

A copy of said decision of the Secretary of the Interior is hereto attached, marked "Exhibit A," which it is prayed may be read and considered as a part of this bill.

X.

That, in execution of and pursuant to the said decision and direction of the Secretary of the Interior, the Commissioner of the General Land Office, on December 5, 1895, submitted to the Secretary of the Interior a list, specified and described as "Clear List No. 51," duly prepared and certi-

fied in accordance with the rules and regulations and in obedience to the directions of said Secretary, given October 31, 1895, as aforesaid, embracing the lands enumerated and described in paragraph three of this bill, and recommended that said Clear List No. 51 be approved; and your orator says that thereafter, to wit, on December 10, 1895, the Secretary of the Interior endorsed his approval on said list No. 51, said endorsement and approval being in words and figures as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF THE SECRETARY,
"WASHINGTON, D. C., *Dec'r* 10, 1895.

"The foregoing list No. 51 of swamp lands selected in the New Orleans land district, Louisiana, embracing an area of six thousand four hundred and ninety-seven and forty one-hundredths of an acre (6,497.40), is hereby approved to the State of Louisiana under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850, subject to any valid adverse rights that may subsist to any of the tracts therein described."

"(Signed) HOKE SMITH,
"Secretary."

And your orator avers and submits to the court that immediately upon and by the approval of said list No. 51 by the said Secretary of the Interior on the 10th day of December, 1895, the title to each and all of the lands referred to and specified in said list No. 51, the same being the lands specified and described in paragraph three of the bill, vested *eo instanti* in the State of Louisiana in fee simple in pursuance of the provisions of section 2 of the said act of March 2, 1849 (9 Stat., 352).

XI.

And your orator further advises the court that, notwithstanding the said action of the Secretary of the Interior of December 10, 1895, in approving said list No. 51 and the

vestiture thereby of the fee-simple title to said lands in the State of Louisiana and the divestiture of any and all further jurisdiction over said lands by the Land Department of the United States, the Commissioner of the General Land Office on May 20, 1901, submitted to the Secretary of the Interior a written request for instructions as to "whether or not," in view of a number of departmental decisions rendered since the Fort Sabine Military Reservation case was considered, the lands embraced in said certified list No. 51 "should be patented and certified to the State."

That thereupon, notwithstanding the protest of your orator that the title of the State of Louisiana to each and all of the tracts or parcels of land embraced, enumerated, and described in said approved list No. 51 *fully and completely vested in fee simple on and by the approval of said list No. 51 by the Secretary of the Interior on December 10, 1895*, and that hence, as matter of law, said title was, is, and remained beyond the power and jurisdiction of the Secretary of the Interior to question, deny, recall, vacate, revoke, or impair, the Secretary of the Interior, nevertheless assumed jurisdiction and authority to pass upon the question of the vestiture of title by and on the approval of said list No. 51, as aforesaid, and in a communication dated June 6, 1904, addressed to the Commissioner of the General Land Office, instructed said Commissioner of the General Land Office as follows:

> "My predecessor's approval of said list is hereby recalled and vacated, and these lands will be held for disposition as provided by law."

And your orator advises the court that the said holding and action was had and the said instruction and direction given to the Commissioner of the General Land Office by the Secretary of the Interior, not because it was found that the said lands embraced by and described in said approved list No. 51 fall within any of the classes enumerated and specified in said act of March 2, 1849, as excluding and excepting

swamp and overflowed lands from the grant thereby made, or because any of said lands were not swamp and overflowed lands, unfit for cultivation, as they had theretofore been affirmatively found and adjudicated by the department to have been at the date of the grant of March 2, 1849; and not because any of said lands fronted on rivers, creeks, bayous, water-courses, etc., and as such had been surveyed into lots or tracts under the acts of March 3, 1811, and May 24, 1824, but because of the holding by the said Secretary of the Interior that said lands, being at the time of the passage of the act of March 2, 1849 (9 Stat., 352), embraced within the limits of a military reservation theretofore established by order of the President of the United States, to wit, the Fort Sabine Military Reservation, in the State of Louisiana, were not granted by said act of March 2, 1849; and because of the contention on his part that—

> "lands in reservation for any purpose are not public lands within the operative effect of a subsequent grant of Congress, and that this is so without regard to the fact that such lands are not in terms excepted from the operation of such grant";

and because of his further contention that "there is no intention manifest in the acts of 1849 and 1850 to pass the title in lands reserved for any purpose."

Your orator here denies that, as matter of law, there existed in the said Secretary of the Interior any power, authority, or jurisdiction to recall or vacate the approval by the Secretary of the Interior on December 10, 1895, of said swamp land list No. 51, and here avers and maintains that on and by the approval by the Secretary of the Interior on December 10, 1895, of said swamp land list No. 51, in furtherance of his decision of October 31, 1895, that said lands were granted to the State of Louisiana by said act of March 2, 1849, the fee-simple title to the lands embraced in said list vested in the State of Louisiana beyond the authority, power, or jurisdiction of the Secretary of the In-

terior and any and all action taken by him in which he undertook to recall and vacate the approval by the Secretary of the Interior, one of his predecessors, on December 10, 1895, of said swamp land list No. 51, is null and void and of no effect and operation in law.

XII.

And your orator further shows and states to the court that, still insisting and maintaining that the Secretary of the Interior was without authority of law to interfere with, disturb, or deny the title of the State of Louisiana to the lands enumerated and described in said swamp land list No. 51, or to deny that said title vested in fee simple upon and by the approval of said list No. 51 by the Secretary of the Interior on December 10, 1895, or that the Secretary of the Interior had any authority or warrant of law or jurisdiction to recall or vacate the approval of said swamp land list No. 51, so had and made on December 10, 1895, as aforesaid, your orator duly filed with the said Secretary of the Interior a further protest, requesting the review and reconsideration of his action of June 6, 1904; which said motion was, by an order signed by the said Secretary of the Interior and dated September 20, 1904, overruled and denied and said action of June 6, 1904, adhered to and sustained.

And your orator further advises this honorable court that, at the instance and request of your orator, still protesting against the action of the Secretary of the Interior in attempting to annul and defeat the title of the State of Louisiana to the lands aforesaid, the then Secretary of the Interior, by an order or communication, signed by him as such, dated September 27, 1904, addressed to the Commissioner of the General Land Office, directed the then Commissioner of the General Land Office to "return to the department for further consideration" the record upon which said action of June 6, 1904, was based; and that thereafter, to wit, on the 20th day of March, 1907, the present Secretary of the Interior,

the defendant herein, by his formal decision of that date, denied said protest and motion for review and adhered to the aforesaid action of the Secretary of the Interior of September 20, 1904, and June 6, 1904, thereby assuming and asserting authority and jurisdiction in the Secretary of the Interior, as matter of law, to recall and vacate the said approval by the Secretary of the Interior on December 10, 1895, of said swamp land list No. 51 and thereby finally holding and affirming that the same was vacated and annulled by the action of the Secretary of the Interior, had on June 6, 1904, hereinbefore referred to, and this notwithstanding the fact that said decision of March 20, 1907, concedes that the lands in question are swamp and overflowed lands within the meaning of said act of March 2, 1849.

XIII.

And your orator further alleges and avers that, relying on the grant made by the said act of Congress approved March 2, 1849 (9 Stat., 352), of the whole of the swamp and overflowed lands in the State of Louisiana, your orator has from time to time sold and disposed of certain of said tracts enumerated in and embraced by said approved list, and has issued to its vendee or vendees its patent or patents therefor, and that certain of said tracts so patented as aforesaid have, as your orator is informed and believes, passed by mesne conveyances into the hands of third parties, who, like the direct vendees of the State of Louisiana, bought on the strength of the grant made by the said act of March 2, 1849, and on faith of the vestiture of the title thereunder in said State as evidenced by said approved list No. 51.

And your orator further shows and represents to the court that certain of the tracts so approved to the State of Louisiana in said list No. 51 have not been disposed of, but still remain the property of your orator.

And, as to the tracts so disposed of by your orator and also as to the tracts still remaining the property of the State of

Louisiana, your orator says that the said action or decision of the said Secretary of the Interior in holding and finding that said lands, though swamp and overflowed within the meaning of the grant to the State, were nevertheless excepted therefrom, and that the action of the said Secretary of the Interior in recalling and revoking the approval of said list No. 51 by the Secretary of the Interior on December 10, 1895, thereby ruling and holding that your orator as well as its vendees are without title to said lands, will, without the interposition of this honorable court, result not only in great loss, detriment, and irreparable injury to your orator and to its vendees, but, as to the tracts so disposed of by your orator, will result in a multiplicity of suits.

And your orator again submits to the court that the said action of the Secretary of the Interior of December 10, 1895, on said swamp land list No. 51—which said list embraced, enumerated, and described the lands referred to in the third paragraph of this bill—was without authority of law and, being without authority of law, was and is null and void, and therefore an unlawful act on the part of the Secretary of the Interior, in that it is and will constitute, unless prevented by this honorable court, your orator being without remedy at law, the setting aside and annulling of a public record made by the Secretary of the Interior on December 10, 1895, to wit, the approving of said swamp land list No. 51, the said Secretary of the Interior then and there, on said 10th day of December, 1895, performing an official duty or act authorized and required by the said act of Congress approved March 2, 1849 (9 Stat., 352), the doing of which, to wit, the approval of said list, the said act of Congress declares *shall vest* title to the lands in the State of Louisiana in fee simple.

And your orator avers and submits to the court that the said action of the Secretary of the Interior in recalling and revoking or undertaking to recall or revoke the approval by the Secretary of the Interior on December 10, 1895, of the

said swamp land list No. 51 and the affirmance of said act by the present Secretary of the Interior, defendant herein, deprives your orator of the evidence provided for by said act of March 2, 1849; that its title to said lands has vested in fee simple, and this to the great detriment and injury of the State of Louisiana.

XIV.

And your orator further advises the court that the defendant hereto, the Commissioner of the General Land Office, he being required by law to perform the executive duties of his office under the supervision and direction of the Secretary of the Interior, will as such Commissioner, in the execution of the said instructions and the decision or decisions of the Secretary of the Interior, unless restrained and enjoined in that regard by the order of this honorable court, make or cause to be made on the records, lists, and papers of his office, and particularly on said swamp land list No. 51, notations, entries, statements, or endorsements that the approval of said swamp land list No. 51 aforesaid has been or is vacated, recalled, or canceled, and will proceed with an unlawful effort to again dispose of said lands as if within the jurisdiction of the Land Department of the United States and free from the prior vested and indefeasible rights of the State of Louisiana, as aforesaid, thereby denying to and depriving your orator, to the great damage and injury to the State of Louisiana, of the evidence which said swamp land list No. 51 furnishes; that, pursuant to the provisions of the act of Congress approved March 2, 1849, the title of the State of Louisiana had, as to all the lands specified and referred to in said list, vested in fee simple on December 10, 1895, by the formal approval by the then Secretary of the Interior, and causing a multiplicity of suits with any possible misguided persons or corporations to whom the said defendants, acting for, in the name and on behalf of the United States, may thus hereafter permit to acquire patents to said lands or any part thereof.

Wherefore, in view of the premises, your orator prays:

1st. That your honors will grant unto your orator a writ of subpœna, issuing out of and under the seal of this honorable court, directed to the defendants, James Rudolph Garfield, Secretary of the Interior, and Richard A. Ballinger, Commissioner of the General Land Office, and each of them, requiring and commanding them and each of them, on a certain day, to appear and answer, but not under oath, the exigencies of this bill of complaint.

2d. That this honorable court will adjudge and decree that "the whole of those swamp and overflowed lands which may be or are found unfit for cultivation" in the State of Louisiana were granted to said State by the act of Congress approved March 2, 1849 (9 Stat., 352), except such swamp and overflowed lands subject to overflow and unfit for cultivation as were claimed or held by individuals at the time of the passage of said act, and except, also, such swamp and overflowed lands in said State "fronting on rivers, creeks, bayous, water-courses, &c.," which had at the time of the approval of said act of March 2, 1849, "been surveyed into lots or tracts under the act of third March, eighteen hundred and eleven, and twenty-fourth May, eighteen hundred and twenty-four," or either of said acts.

3d. That the approval of the Secretary of the Interior on December 10, 1895, of the list of swamp and overflowed lands in the State of Louisiana known and designated as swamp land list No. 51 vested *eo instanti* in the State of Louisiana the fee-simple title to each and all of the tracts of land in said list specified, designated, and described.

4th. That, such fee-simple title having so vested in the State of Louisiana by the approval of said list, it was not competent for or within the power and jurisdiction of the Secretary of the Interior to revoke the action of his predecessor as Secretary of the Interior, on December 10, 1895, in approving said list No. 51, and that said Secretary of the Interior was on June 6, 1904, without authority or jurisdiction in law to revoke or recall the approval by his predecessor,

as Secretary of the Interior, of said swamp land list No. 51 on December 10, 1895, and that the present Secretary of the Interior, the defendant herein, was on March 20, 1907, without authority of law to affirm and sustain the aforesaid action of his predecessor had on June 6, 1904.

5th. That it may please the court to grant the plaintiff a writ of injunction restraining the defendants and each of them from executing said order of the Secretary of the Interior of June 6, 1904, and any and all subsequent orders based thereon or issued pursuant thereto, and from in any way clouding the title of or molesting the plaintiff and its grantees in the enjoyment of the rights, privileges, and title secured by said plaintiff by the approval of said swamp land list No. 51 by the Secretary of the Interior on December 10, 1895, under and pursuant to the act of March 2, 1849; and, further, from making or attempting to make any other or further disposition of said lands whatsoever to the detriment of the title of your orator.

6th. That your honors will grant unto your orator such other and further relief as equity and the nature of the case may require.

THE STATE OF LOUISIANA,
By WALTER GUION,
Attorney-General of Louisiana.

STATE OF LOUISIANA,
Parish of East Baton Rouge, ss:

Personally appeared before me, the undersigned authority, Newton C. Blanchard, who, being sworn in the foregoing cause, on his oath says that he is the Governor of the State of Louisiana, and as such requested and directed the filing of said bill therein; that the facts therein stated are true to the best of his knowledge and belief.

NEWTON C. BLANCHARD.

Subscribed and sworn to before me this 22 day of May, 1907.

T. E. MCHUGH,
Clerk and ex-Officio Notary Public.

EXHIBIT A.

F. L. C. J. L. V. B. R. W. H.

J. I. H. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *October* 31, 1895.

Ex Parte STATE OF LOUISIANA.

Swamp Land Claim, Louisiana.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: The State of Louisiana has appealed from your office decision of September 13, 1893, rejecting her claim, under the swamp land laws, of the following tracts of land:

"In T. 14 S., R. 15 W.; the west part of section 27, containing 40 acres; all of section 28, containing 240 acres; lots 1 and 4, the S. W. ¼, and the N. E. ¼ and the S. W. ¼ of the S. E. ¼ of section 31, containing 291.10 acres; all of section 32, containing 520 acres; all of section 33, containing 640 acres; and the west part of section 34, containing 400 acres; aggregating 2,131.10 acres in said township.

"In T. 15 S., R. 15 W.; the west part of section 2, containing 20 acres; the west part of section 3, containing 620 acres; the west part of section 11, containing 240 acres; the west part of section 14, containing 440 acres; the west part of section 23, containing 635 acres; the west part of section 24, containing 50 acres; and the west part of section 25, containing 150 acres; aggregating 2,155 acres in said township.

"In T. 14 S., R. 16 W.; section 36, containing 71.30 acres.

"In T. 15 S., R. 16 W.; all of section 1, containing 600 acres; all of section 2, containing 160 acres; all of section 11, containing 40 acres; all of section 12,

containing 630 acres; all of section 13, containing 320 acres; all of section 24, containing 380 acres; and all of section 25, containing 10 acres; aggregating 2,211 acres, in said township.

"And aggregating in all four townships aforesaid, 6,497 acres, in the New Orleans land district, Louisiana."

The tracts front north, west, and south on Sabine Lake, Sabine Pass, and the Gulf of Mexico. They are bounded on the east by a straight line, running from a point on the shore of the lake in section 27, T. 14 S., R. 15 W., south 29 degrees east, ten miles, to a point on the shore of the Gulf in section 25, T. 15 S., R. 15 W. They lie within the limits of the Fort Sabine Military Reservation established by the President's order of December 20, 1838, and then transferred by the Commissioner of the General Land Office to the possession and control of the Secretary of War for military purposes. The reservation embraced the whole peninsula lying west of the straight line aforesaid and bounded by Sabine Lake, Sabine Pass, and the Gulf of Mexico.

At the time of the passage of the swamp land act of March 2, 1849 (9 Stat., 352), all of the lands embraced in said reservation had been for more than ten years severed from the public domain, removed from the control and supervision of the Land Department, and appropriated for special uses by a co-ordinate executive department.

On December 7, 1850, the State of Louisiana filed in the district land office at Opelousas swamp land selection list No. 4, claiming under the act of March 2, 1849, more than 1,000,000 acres of land, including all the land within the reservation; but on the face of the list the Surveyor-General wrote opposite the description of the subdivisions reserved the following words: "Part of this township is subject to a military reservation. See letter from the Commissioner of

the General Land Office, dated December 21, 1838." The attention of the Commissioner and the Secretary of the Interior was thus called to the fact that said subdivisions were not within their jurisdiction, supervision, or control, and that they had no lawful authority to dispose of them; consequently said list was corrected. All of the subdivisions and parts of subdivisions lying west of the east line of the reservation were rejected and left out. Those fractional parts of subdivisions intersected by said line which lay east thereof were carefully selected and estimated and inserted in the list of selections to be approved. One of the fractions contained only five acres; two others contained only twenty acres each. Pains were taken to make the corrected and approved list express upon its face the decision of the Secretary, to approve proper selections which lay outside of the military reservation, and to disapprove and reject all that lay within. Such corrected list was approved on May 5, 1852, by Secretary A. H. H. Stuart.

In 1854 Congress directed a light-house to be built on Louisiana Point near the mouth of Sabine Pass. The Secretary of the Treasury, through the Light-House Board, applied to the Commissioner of the General Land Office for land on which to locate it and other necessary buildings. He was informed that the land was a military reservation, under the jurisdiction and control of the War Department as military property. The Secretary of War was therefore the proper person to consent to the use of a part of it for commercial purposes. The light-house and its appurtenances were built in 1856 and are still maintained.

By act of February 24, 1871 (16 Stat., 430), Congress—

> "authorized and empowered the Secretary of War to transfer to the custody and control of the Secretary of the Interior, for disposition for cash according to the existing laws of the United States relating to public lands, and after appraisement, to the highest bidder and at not less than the appraised value, nor less than

> one dollar and twenty-five cents per acre, the United States military reservation at Fort Sabine, in the State of Louisiana."

It appears that on July 1, 1884, Acting Secretary M. L. Joslyn approved "No. 26, a list of swamp and overflowed lands selected as inuring to the State of Louisiana," etc. Said list includes all of sections 4, 5, 6, 7, 8, 9, 10, 15, 17, 18, 19, 20, 21, 22, 26, 27, 28, 29, 32, 33, and 34 of township 15 south, range 15 west, aggregating 11,907.41 acres and comprising the whole of said reservation except the school section 16, in T. 15, and lots 2 and 3 and the N. W. ¼ and the S. E. ¼ of the S. E. ¼ of section 31, in T. 14, which lie upon a ridge, and the tracts described in the list now before me, which form a margin on the eastern, northern, and western sides of the reservation where the subdivisions are intersected by the boundary lines and made fractional. I am informed by your office decision—

> "That the facts—1st, that said tracts were claimed conditionally as subject to a military reserve; 2d, that action on the claim had previously been suspended on account of doubts as to whether or not the lands had been granted, and, 3d, that Congress had provided for the disposal of the lands by special legislation—were not brought to the notice of the Secretary, either in the certificates or in the letter submitting the list for approval. On the contrary, both the lists and the letter of transmittal represented the case as an ordinary one, about which no conditions existed calling for the special consideration of the Secretary or of his legal advisers."

Inspection of said list No. 26 and the certificates attached thereto sustains your statement. The certificates state affirmatively that "said list is found to be free from conflict by sale or otherwise." They contain no reference to the military reservation, or to the fact that on May 5, 1852, Secretary Stuart had considered and rejected the State's

claim to the tracts of land included in said list. They do not contain any statement to the effect that the tracts described in the list have been found or decided to be swamp and overflowed lands by field-notes of the surveyors or by "personal examination by experienced and faithful deputies," as required by the statute, or in any other manner. The attention of the Secretary was not called to act of February 24, 1871, *supra*, or to the fact that the presentation of said list No. 26 for his approval raised before him for his decision the question: Did Congress by the swamp land acts of 1849 or 1850 grant to the State of Louisiana swamp lands within the boundaries of Fort Sabine Military Reservation?

That question is now plainly brought before me by the pending appeal. I decide it in the affirmative.

I am of opinion that the acts of March 2, 1849 (9 Stat., 352), and September 28, 1850 (9 Stat., 519), granted to the State of Louisiana all of the "swamp and overflowed lands made unfit thereby for cultivation," lying within the Fort Sabine Military Reservation as established by the President's order of December 20, 1838, subject, however, to the right of the United States to use the same for military purposes during pleasure or so long as might be necessary in the judgment of the military authorities; and that when said military reservation was abandoned by operation of the act of February 24, 1871 (16 Stat., 430), the title and right of possession of the State of Louisiana under the acts of 1849 and 1850 aforesaid attached at once in fee simple to the swamp and overflowed lands embraced within said reservation. The act of 1871 aforesaid cannot be construed as intending to make any disposition of said swamp and overflowed lands inconsistent with the title previously granted to the State of Louisiana as aforesaid (Wilcox *v.* McConnell, 13 Peters, 513, and Leavenworth R. R. Co. *v.* United States, 92 U. S., 741; Hastings and Dakota R. R. Co. *v.* Whitney, 132 U. S., 357-360).

Your office decision is hereby reversed. The tracts of land hereinbefore specified and described will be certified to the State of Louisiana under the swamp land grants.

The papers transmitted with your office letter "K" of June 18, 1894, are herewith returned.

Very respectfully,

HOKE SMITH, *Secretary.*

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE STATE OF LOUISIANA, complainant, v. JAMES RUDOLPH GARFIELD, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office.	No. 9, Original.

DEMURRER OF DEFENDANTS.

Comes now the Attorney-General of the United States, on behalf of James Rudolph Garfield, Secretary of the Interior, and Fred Dennett, Commissioner of the General Land Office, defendants in the above-entitled case, and, not confessing all or any of the matters and things contained in the complainant's bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, demurs to said bill, and, as cause therefor, respectfully shows:

First. That this suit is not one of which this court has jurisdiction, because the issues presented by the bill of complaint do not arise between the State of Louisiana and the said defendants, and

do not concern them, or either of them, but arise, if at all, between the said State and the United States, which has not consented to be sued, can not be sued without its consent, and, therefore, has not been and can not properly be made a party hereto.

Second. That it appears from said bill of complaint that the State of Louisiana has not now and never had any title, interest, or claim in or to the lands which are the subject-matter of this suit, for the reason that, at the date of the passage of the act of Congress under which the lands are claimed by said State, these lands, as alleged in said bill of complaint, were embraced within the limits of a military reservation theretofore established by order of the President of the United States, to wit, the Fort Sabine Military Reservation, in the State of Louisiana, and, therefore, were not intended to be and were not granted to said State under that or any other act.

Third. That it appears that the legal title to these lands remains in the United States, and under such circumstances the acts complained of against these defendants and the acts sought to be enjoined, which are judicial and not ministerial in character, rest exclusively within the jurisdiction of the Interior Department of the Government in the administration of the public lands of the United States, and are not, during such administration, subject to examination or determination by this court.

Fourth. That it does not appear that there has been any final adjudication by the defendants, or either of them, or by their predecessors in the Department of the Interior, in such administration of the public lands, or otherwise, which would have the effect of vesting title to these lands in the State of Louisiana, and that, therefore, action by them is not, at this time, subject to control, interference, or review by this court.

Fifth. That, as it appears from said bill of complaint, the defendants, if they should, in fact, threaten to proceed in the performance of the acts which complainant seeks to enjoin, which intention on their part is not herein admitted, would nevertheless be proceeding in pursuance of the express authorization and direction of the Congress of the United States, contained in the act of February 24, 1871, mentioned in said bill of complaint, and therefore the granting of an injunction would not come within the province of this court, for the reason that it would be an interference with and restraint upon the political branch of the Government in its transactions with a sovereign State of the Union.

Sixth. That said bill of complaint does not contain any matter of equity whereon this court can grant a decree or give to the complainant any relief against the defendants, for the reason that, as it appears on the face of said bill of complaint that the purpose of the suit is to recover the title to

certain real property in the State of Louisiana, the cause of action, if any exists, is legal and not equitable, and this court, sitting as a court of equity, is without jurisdiction to hear and determine the controversy, but any right to said real estate must be asserted, if at all, in a court of law.

Seventh. That said bill of complaint is in other respects uncertain, informal, and insufficient, and does not state facts sufficient to entitle the State of Louisiana to any relief.

Wherefore, the respondents respectfully demand the judgment of this court whether they shall be compelled to make any other or further answer to the said bill of complaint, and pray to be dismissed with their costs and charges in this behalf most wrongfully sustained.

CHARLES J. BONAPARTE,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

APRIL, 1908.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE STATE OF LOUISIANA, COMPLAINANT, v. JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, and Richard A. Ballinger, Commissioner of the General Land Office.	No. 9, Original.

MOTION ON BEHALF OF THE DEFENDANTS TO DISMISS FOR WANT OF JURISDICTION, AND BRIEF IN SUPPORT THEREOF.

MOTION.

Comes now the Attorney-General of the United States on behalf of James Rudolph Garfield, Secretary of the Interior, and Richard A. Ballinger, Commissioner of the General Land Office, defendants in the above-entitled case, and, appearing for the purposes of this motion only, moves the court to dismiss the bill of complaint, and, as cause therefor, respectfully submits the following reasons:

STATEMENT.

This suit is brought in behalf of the State of Louisiana, by its attorney-general, for the purpose of enjoining the defendants, officers of the United States, from proceeding, under the public land laws, to dispose of certain lands in that State, the title to which, it is alleged, has become vested in the State by virtue

of a grant of swamp lands and the action taken in the General Land Office in that connection.

An act of Congress approved March 2, 1849 (9 Stat., 352), entitled "An act to aid the State of Louisiana in draining the swamp lands therein," reads as follows:

> That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.
>
> SEC. 2. *And be it further enacted*, That as soon as the Secretary of the Treasury shall be advised, by the governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of same to be made out and certified by the deputies and surveyor-general, to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.

SEC. 3. *And be it further enacted*, That in making out a list of these swamp lands, subject to overflow and unfit for cultivation, all legal subdivisions, the greater part of which is of that character, shall be included in said list; but when the greater part of a subdivision is not of that character the whole of it shall be excluded therefrom: *Provided, however*, That the provisions of this act shall not apply to any lands fronting on rivers, creeks, bayous, water courses, etc., which have been surveyed into lots or tracts under the acts of third March, eighteen hundred and eleven, and twenty-fourth May, eighteen hundred and twenty-four: *And provided, further*, That the United States shall in no manner be held liable for any expense incurred in selecting these lands and making out the lists thereof, or for making any surveys that may be required to carry out the provisions of this act.

The act of September 28, 1850 (9 Stat., 519), entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," contains the following provisions:

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the

passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands known as designated as aforesaid, may be situated.

The bill alleges that in 1893 the Commissioner of the General Land Office rejected the claim of the State, for the reason that, at the date of the grant, the lands in question were within the limits of the Fort Sabine Military Reservation, which, under the provisions of an act of February 24, 1871 (16 Stat., 430), was subsequently abandoned, and that in 1895 the

Secretary of the Interior reversed this decision and indorsed his approval upon the list in question, as follows:

> The foregoing list No. 51 of swamp lands selected in the New Orleans land district, Louisiana, embracing an area of six thousand four hundred and ninety-seven and forty one-hundredths of an acre (6,497.40), is hereby approved to the State of Louisiana *under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850,* subject to any valid adverse rights that may subsist to any of the tracts therein described.

The bill continues by alleging that thereupon the title vested in the State of Louisiana in fee simple; but that, upon the request of the Commissioner of the General Land Office for instructions whether, "in view of a number of Departmental decisions rendered since" the case was first considered, the lands "should be patented and certified to the State," the then Secretary of the Interior, on June 6, 1904, recalled and vacated this approval by his predecessor, and directed that the lands be held for disposition as provided by law (33 Land Dec., 13); and that the action of the Secretary in vacating this order was null and void.

BRIEF.

I.

The United States, the real party in interest as defendant, has not consented to be sued, and cannot be sued without its consent.

In the case of *Minnesota* v. *Hitchcock* (185 U. S., 373), as in this, a State was plaintiff in a suit against

the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections in an Indian reservation, and the court said (p. 387):

> Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is therefore the real party affected by the judgment and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.

It was held, however, that a certain act of Congress was a sufficient consent on the part of the United States to be sued in respect to school lands within an Indian reservation, but in the case of *Oregon* v. *Hitchcock* (202 U. S., 60), a suit by a State against the same officers to restrain them from allotting and patenting in severalty swamp lands within an In-

dian reservation, there was no act of Congress which could be so construed. The court, therefore, held that it was without jurisdiction. In *Naganab* v. *Hitchcock* (202 U. S., 473) this decision was affirmed.

This court has also determined that, although a State may be sued by the United States without its consent, public policy forbids that the United States should, without its consent, be sued by a State. (*Kansas* v. *United States*, 204 U. S., 331.)

II.

The swamp-land grant was not intended to and did not cover the lands within this military reservation.

In *Wilcox* v. *Jackson* (13 Pet., 498) the sale of certain lands under authority of an act of Congress had been ordered, without excepting therefrom a military reservation included within the boundaries thereof, and, after holding that the act did not apply to the reservation lands, the court added (p. 513):

> We go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate upon it; although no reservation were made of it.

Congress enacted "That there be, and is hereby, granted" to a State, to aid in the construction of a railroad, "every alternate section of *land*, designated by odd numbers," within certain limits, and this

court held that such a grant is applicable only to *public land* of the United States, and does not embrace land within the limits of an Indian reservation. (*Leavenworth, etc., Railroad Company* v. *United States*, 92 U. S., 733.) Mr. Justice Davis, delivering the opinion of the court, said (p. 741):

> Such grants could not be otherwise construed; for Congress can not be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts.

Referring to the case of *Wilcox* v. *Jackson* (*supra*), the court continued (p. 745):

> It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The Supreme Courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. (*State* v. *Delesdenier*, 7 Tex., 76; *Spaulding* v. *Martin*, 11 Wis., 262.)

In the latter case the Supreme Court of Wisconsin said (p. 274):

> When the Government, therefore, obviously in pursuance of its general policy in respect to its public lands held for sale, makes a grant to the State of large quantities, reaching through

> an extensive tract of country, where it has large bodies of those lands, it is impossible to believe they intended to grant those tracts which had been set apart for public use. On the contrary, such a grant can be reasonably construed as referring only to those lands within the policy which induced it. And it must be assumed that these reservations were not specifically excepted in the grant, for the reason that they were so obviously outside of its scope and intent that such exception was not supposed to be necessary. And this view is sustained by the only authorities that have ever passed upon the question.

These decisions have been recently affirmed. (*Scott* v. *Carew*, 196 U. S., 100.)

It is difficult to imagine any reason which could be advanced in support of a contention that a grant of all lands which are swamp within a State is different in principle from a grant of all lands within described boundaries, so far as exceptions therefrom are concerned.

The swamp-land grants, like those in aid of railroads, are in *præsenti*. (*Michigan Land and Lumber Company* v. *Rust*, 168 U. S., 589.) Bearing in mind the general rule that these grants must be interpreted most strongly against the grantees (*United States* v. *Michigan*, 190 U. S., 379, 401), it seems clear that the military reservation lands were not embraced within the swamp-land grants, and, being thus excepted at the date thereof, it is immaterial whether they subsequently become public lands. (*Leavenworth, etc., Railroad Company* v. *United States*, *supra*, p. 749.)

Congress thus understood and so interpreted the grants. By an act of February 24, 1871 (16 Stat., 430), it—

> authorized and empowered the Secretary of War to transfer to the custody and control of the Secretary of the Interior, for disposition for cash according to the existing laws of the United States relating to public lands, after appraisement, to the highest bidder, and at not less than the appraised value, nor at less than one dollar and twenty-five cents per acre, the United States military reservation at Fort Sabine, in the State of Louisiana.

III.

The legal title to the land in question remains in the United States.

The complainant alleges that the Secretary of the Interior, in 1895, approved a list covering the tracts in question, and that, under the granting act of 1849, "on that approval, the fee simple to said lands shall vest in the said State of Louisiana."

The act of 1850, however, to the provisions which the complainant does not refer, provides that the Secretary of the Interior shall "cause a patent to be issued to the State therefor, and on that patent the fee simple to said lands shall vest in the said State."

Under this later act the legal title passes only upon delivery of patent. In *Brown* v. *Hitchcock* (173 U. S., 473), as in the present case, it was contended that the action of the Secretary of the Interior, in revoking an approval by his predecessor of a selection of lands

under this act of 1850, was void, but Mr. Justice Brewer, delivering the opinion, said (p. 476):

> Under the swamp land act the legal title passes only on delivery of the patent. So the statute in terms declares * * *. In this case the record discloses no patent and therefore no passing of the legal title * * *. Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department.

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is *a law as well as a conveyance*, and that such effect must be given to it as will carry out the intent of Congress." (*Missouri, etc., Railway Company* v. *Kansas Pacific Railway Company*, 97 U. S., 491, 497.)

In *Barney* v. *Dolph* (97 U. S., 652) it appeared that the original act granting land to settlers in Oregon, known as the Donation Act, had provided that, in cases where married persons had complied with its provisions and one died before patent issued, the survivor and children or heirs of the deceased should be entitled to his or her share, unless it should be disposed of by will, and that all contracts for the sale of the land before patent should be void. A later act repealing the prohibition of sales was held inconsistent with the provision as to descent to heirs in case of death before patent, the court saying (pp. 656, 658):

> If there is a positive and irreconcilable repugnancy between the old law and the new,

> the new must stand and the old fall, even though the result is reached by implication alone. * * * The two cannot stand together, and consequently the power of sale, which was the latest enactment, must prevail.

The same principle applies in the present case. The provision that legal title shall pass when a patent issues is clearly inconsistent with one that such title passes upon the approval of a list of the lands, and, being later, repeals the former.

The act of 1850 applies to Louisiana. (*United States* v. *Louisiana*, 123 U. S., 32; 127 U. S., 182.) Heretofore the State has assumed that its provisions were controlling. The register of the State land office, under authority of an act of the State legislature (act 43, Sess. Laws, 1892), "protested to the Secretary of the Interior against the patenting of the lands embraced in the approved list, because the selection and listing did not describe the lands in accordance with the latest approved survey thereof." (33 Land Dec., 15.) In his decision of June 6, 1904 (33 Land Dec., 16), the Secretary of the Interior says:

> The list submitted to the Secretary of the Interior, list 51, was made up in the General Land Office from the State's original selection list No. 4, it is true, but was submitted for approval as a selection under both the acts of 1849 and 1850, and was approved, as has been seen, "under the act of March 2, 1849, as supplemented and enlarged by the act of September 28, 1850." So that it was really an approval under the act of 1850, and was not intended as

> the final action of the Land Department. The nature of the approval is not open to question. It was clearly not intended as passing title under the act of 1849, and was not so treated by the State, for, as before shown, the State sought to correct the description before the patent of the United States was to be issued upon said approval.

The Revised Statutes, sections 2479 and 2480, covering the swamp-land grants, provide that the Secretary of the Interior "shall cause patents to be issued to said State therefor, conveying to said State the fee simple of said land." There is no provision excepting Louisiana from this general rule, and special swamp-land provisions applicable to other States are included in the revision. (Secs. 2485, et. seq.)

But whether or not the act of 1850 repealed inconsistent provisions in the former act, complainant still has not established its case. It claims an approval under the act of 1849, which, it says, passed the legal title. Instead of showing any such approval, it refers only to an order which expressly declares that it is an approval "under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850." Its own evidence does not support its claim. Whatever might have been the force and effect of an approval under the former act need not concern us. There is no such approval.

There is another reason for concluding that the legal title has not passed. By an act of August 3, 1854 (R. S., sec. 2449), Congress provided:

> That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been, or may hereafter be certified by the Commissioner of the General Land Office, * * * shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby.

In the case now before us there was no such certificate, and, referring to this act, the Secretary of the Interior well said (33 Land Dec., 17):

> This legislation was in clear recognition of the prevailing methods of the land department in administering grants of the character specified. A suggestion that inasmuch as the grant of 1849 is *in presenti*, and inasmuch as the act making that grant provided that the fee-simple title should vest in the State upon the *approval* of its lists of selections by the Secretary of the Interior, therefore the Congress was without authority to change its terms, is without force. The act of 1849 provided for the selection of the lands granted by the Secretary of the Treasury (Interior), and his approval was to pass the fee-simple title. Until such approval there was in fact no selection, and the title remained in the United States. It was clearly, therefore, within the power of Congress to provide a different means of administering

> the grant as to land not already approved. The act of 1854 furnished a rule of administration, if, indeed, Congressional legislation recognizing a uniform practice in this particular was necessary, and does not add to or take from the act of 1849 any material provision. It is not perceived that any right of the State, either legal or equitable, is invaded thereby.

The authority of the Secretary, under such circumstances, to revoke the order of his predecessor, can not be questioned. Like action was upheld in the case of *Brown* v. *Hitchcock* (*supra*). Moreover, as already shown, the lands in this case were clearly excepted from the grant, and therefore, inasmuch as public officers can not bind the Government beyond the scope of their lawful authority (*Leavenworth, etc., Railroad Company* v. *United States*, *supra*, p. 739), it was not only the privilege, but the duty of the Secretary to revoke and annul the unauthorized and unlawful approval.

IV.

That the court will not interfere with the Land Department of the Government in the determination of questions concerning the public lands so long as the legal title remains in the United States is too well settled to require comment. (*Kirwan* v. *Murphy*, 189 U. S., 35; *Bockfinger* v. *Foster*, 190 U. S., 116; *Humbird* v. *Avery*, 195 U. S., 480; *Oregon* v. *Hitchcock*, *supra*.)

Furthermore, it should be observed that the act of February 24, 1871 (*supra*), discontinuing the

military reservation, expressly directed the Secretary of the Interior to dispose of the lands "for cash according to the existing laws of the United States relating to public lands." Thus there does not seem to have been left with the Secretary any authority to inquire whether these reservation lands were, or were not, subject to the swamp-land or any other grant, and to enjoin him from proceeding as plaintiff alleges he threatens to proceed would be to enjoin the enforcement of an act of Congress. It is therefore suggested that the principle that a public officer will not be restrained in the performance of his public trusts, even though the rights of a State may be violated by acts of Congress, should be applied, and that this case is governed by the decisions in *Cherokee Nation* v. *Georgia* (5 Pet., 1); *Mississippi* v. *Johnson* (4 Wall., 475); *Georgia* v. *Stanton* (6 Wall., 50); and *Grant* v. *Cooke* (7 D. C., 165, 174).

Obviously the present case is not one in which the performance of a purely ministerial act may be controlled by the court. We respectfully submit that the suit should be dismissed for want of jurisdiction.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

GLENN E. HUSTED,
Assistant Attorney.

O

Office Supreme Court, U. S.
FILED.
DEC 2 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

Original, No. 7 Equity.

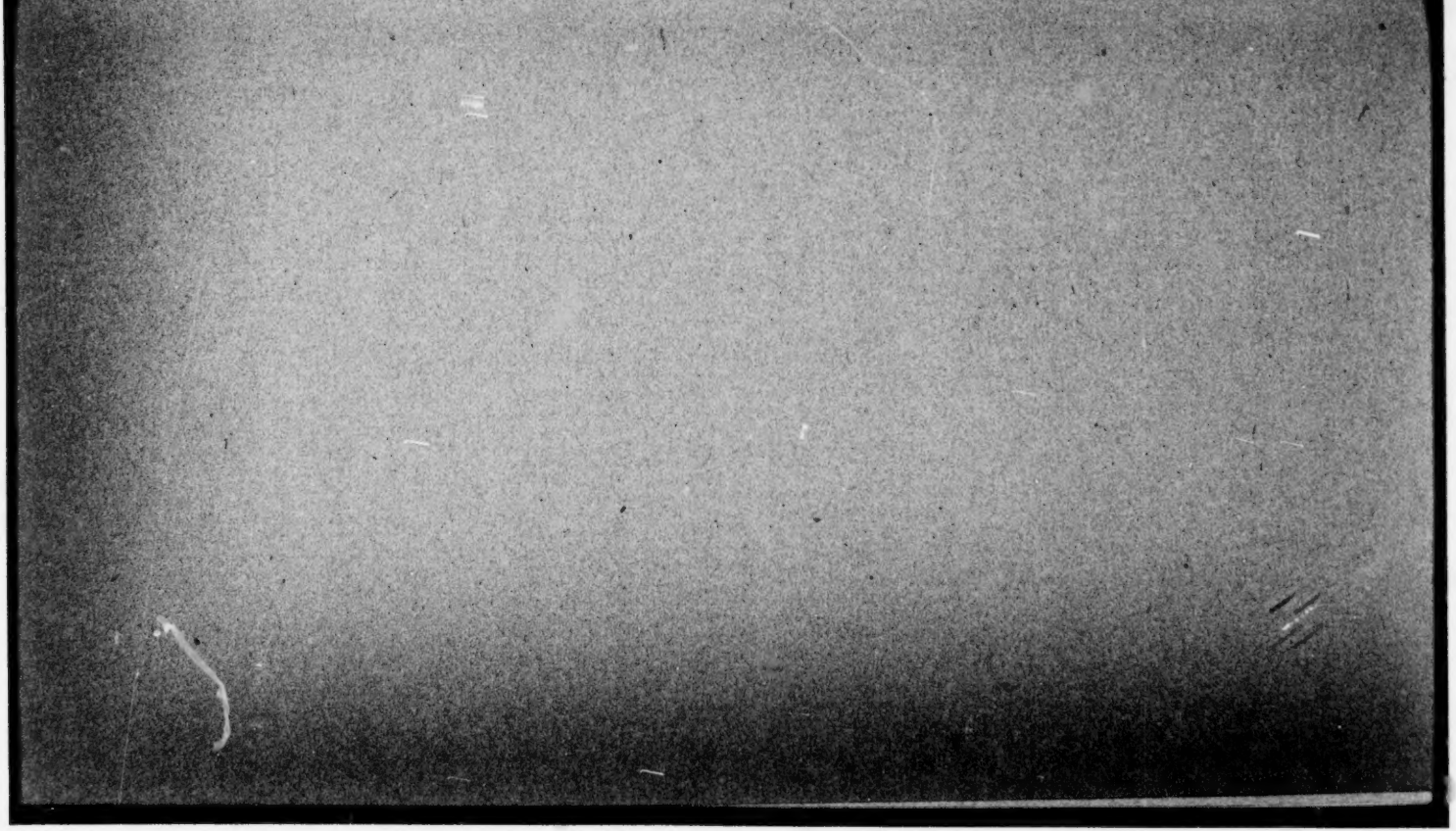
STATE OF LOUISIANA, COMPLAINANT,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, AND RICHARD A. BALLINGER, COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS.

BRIEF FOR COMPLAINANT IN REPLY TO MOTION OF DEFENDANTS TO DISMISS AND TO BRIEF IN SUPPORT THEREOF.

GEORGE H. LAMAR,
Of Counsel for Plaintiff.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Original, No. 9. Equity.

STATE OF LOUISIANA, COMPLAINANT,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, and RICHARD A. BALLINGER, COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS.

Brief for Complainant in Reply to Motion of Defendants to Dismiss and to Brief in Support Thereof.

The case is presented upon the motion on behalf of the defendants to dismiss for want of jurisdiction. In essence, the claim is that the title to the property remains in the United States, and upon this hypothesis the contention is made that the United States is the real party in interest, and that the bill should be dismissed because the United States cannot be sued without its consent.

As the theory of the motion is diametrically opposed to the theory of the complaint, it is deemed proper to briefly state the salient averments of the bill.

The bill was filed, with leave of court, under section 2 of Article III of the Constitution of the United States, on May 27, 1907. Process was then waived in open court by counsel for the defendants.

The bill avers that the plaintiff is one of the sovereign States of the United States; that defendant Garfield is a citizen of the State of Ohio and Secretary of the Interior Department of the United States; that the defendant Ballinger is a citizen of the State of Washington and Commissioner of the General Land Office of the United States; that Congress passed an act, approved March 2, 1849 (9 Stats., 352), entitled "An act to aid the State of Louisiana in draining the swamp lands therein," the provisions of which act are set out in paragraph 3; that at the time of the passage of said act the lands involved, aggregating 6,497.40 acres, "were swamp and overflowed lands, unfit for cultivation;" that on March 2, 1849, none of said lands were held or claimed by individuals, nor were any of them lands fronting on rivers, creeks, etc., which had been surveyed into lots or tracts under the acts of March 3, 1811, and of May 24, 1824; that on December 7, 1850, under and pursuant to said act of March 2, 1849, the Surveyor-General of the United States for Louisiana certified said lands, with others, to the Commissioner of the General Land Office as inuring to the plaintiff under said grant, and reported that they were "subject to a military reservation," meaning the Fort Sabine Military Reservation, which had been established December 20, 1838; that action on said list by the Land Department was suspended in May, 1852, "for further examination and adjudication;" that by executive order of March 25, 1871, issued under the act of Congress approved February 24, 1871 (16 Stats., 430), said reservation was formally abandoned; that on September 13, 1893, the General Land Office, having taken up said swamp land selection for "further examination and adjudication," held the claim of the plaintiff for rejection on the ground that, being within the military reservation, the land did not pass by the grants to the plaintiff; that the plaintiff, having appealed from said decision of September 13, 1893, the Secretary of the Interior, under date of October 31, 1895 (21 Land Decisions, 357),

reversed said decision below and held that the reservation did not inhibit the operation of the grant, and that the act of 1871 "cannot be construed as intending to make any disposition of said swamp and overflowed lands inconsistent with the title previously granted to the State of Louisiana," citing Wilcox *vs.* McConnell, 13 Peters, 513; Leavenworth R. R. Co. *vs.* U. S., 92 U. S., 741; Hastings and Dakota R. R. Co. *vs.* Whitney, 132 U. S., 357-360; and in said decision the Commissioner of the General Land Office was directed that the lands "will be certified to the State of Louisiana under the swamp land grants;" that, "in execution of and pursuant to the said decision and direction," the Commissioner of the General Land Office, on December 5, 1895, submitted "Clear List No. 51, duly prepared and certified in accordance with the rules and regulations," embracing said lands, "and recommended that" the same "be approved;" which list No. 51 was thereafter, to wit, December 10, 1895, approved by the Secretary of the Interior in the following language, to wit:

> "DEPARTMENT OF THE INTERIOR,
> "OFFICE OF THE SECRETARY,
> "WASHINGTON, D. C., *Dec'r* 10, 1895.
>
> "The foregoing list, No. 51, of swamp lands selected in the New Orleans land district, Louisiana, embracing an area of six thousand four hundred and ninety-seven and forty one-hundredths of an acre (6,497.40), is hereby approved to the State of Louisiana under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850, subject to any valid adverse rights that may subsist to any of the tracts therein described.
>
> "(Signed) HOKE SMITH,
> *"Secretary."*

The bill further avers "that *immediately upon* and *by the approval* of said list No. 51 by the said Secretary of the Interior on the 10th day of December, 1895, the *title to* each

and all of the lands *vested eo instanti in the State of Louisiana in fee simple*, in pursuance of the provisions of section 2 of the said act of March 2, 1849" (9 Stats., 352); that, notwithstanding this vestiture of title in the plaintiff and the loss of "*jurisdiction over said lands by the Land Department of the United States*," certain proceedings were unlawfully undertaken by the Commissioner of the General Land Office and the Secretary of the Interior looking to the unlawful cancellation of said list and the unlawful assumption of authority to redispose of said land the same as if the title had not passed from the United States, as in the bill is more particularly set forth, culminating in a communication from the defendant Garfield to defendant Ballinger, dated March 20, 1907, in which these two officers of the Land Department, custodians of the records on which the title of the plaintiff is evidenced, undertake in effect to finally vacate and annul the action of the Secretary of the Interior of December 10, 1895, in approving the list and passing the title to the plaintiff, and further to proceed with the unlawful effort to otherwise dispose of said lands, with the consequent result of producing a multiplicity of suits and the mutilation and unlawful endorsements upon said records under which the plaintiff has acquired title.

The only exhibit to the bill consists of the departmental decision of October 31, 1905, under which the swamp-land list in question was thereafter approved, to wit, on December 10, 1895.

The bill prays, among other things, for a "writ of injunction restraining the defendants and each of them from executing said order of the Secretary of the Interior * * * and any and all subsequent orders based thereon or issued pursuant thereto, and from in any way clouding the title or molesting the plaintiff and its grantees in the enjoyment of the rights, privileges, and title secured by said plaintiff by the approval of said swamp-land list No. 51 by the Secretary of the Interior on December 10, 1895, under and pur-

suant to the act of March 2, 1849; and, further, from making or attempting to make any other or further disposition of said lands whatsoever to the detriment of the title of your orator."

No answer has been filed to this bill. Instead, the defendants, after having previously waived process in open court, seek to appear specially for the purpose of submitting a quasi-demurrer, in the form of a motion to dismiss the bill, for reasons set forth in the brief submitted in support thereof, in which it is contended (1) that the legal title to the land involved remains in the United States; (2) that the United States is the real party in interest as defendant and cannot be sued without its consent; (3) that the swamp-land grant was not intended to and did not cover the lands within the Fort Sabine Military Reservation, in which the lands are located, and (4) that the court will not interfere with the Land Department of the Government in the determination of questions concerning the public lands so long as the legal title remains in the United States.

ARGUMENT.

In the outset of this argument, it is conceded that the jurisdiction of this court hinges upon the proposition of law, on which the complaint is based, that the title to the land passed out of the United States, and the Interior Department therefore lost jurisdiction thereof upon the approval of list No. 51 by the Secretary of the Interior, on December 10, 1895. To successfully controvert this proposition the defendants cannot rely upon their contention that the Secretary of the Interior was wrong in his decision of October 25, 1895 (21 L. D., 357), in holding that the military reservation inhibited the operation of the swamp land grants of March 2, 1849 (9 Stats., 352), and of September 28, 1850 (9 Stats., 519), and in approving the list under the former grant, as plaintiff contends.

The defendants must stand or fall upon their contention that, as a matter of law, the title did not pass from the United States upon the approval of the list.

They cite, in support of their contention, that the suit should be dismissed because the United States is the real party in interest as defendant, has not consented to be sued, and cannot be sued without its consent, three cases, namely, Minnesota *vs.* Hitchcock (185 U. S., 373), Oregon *vs.* Hitchcock (202 U. S., 60), and Naganob *vs.* Hitchcock (202 U. S., 473).

In each of these cases the court distinctly found that the *legal title* to the lands, which were the subject-matter of the suits, was *in the United States*, and that consequently the suit, although nominally against an officer of the United States, was still, nevertheless, a suit against the United States.

In *Minnesota vs. Hitchcock* (185 U. S., 373) the court found that "the legal title to these lands is in the United States," and that "the United States is proposing to sell them," and states the object of the suit to be "to restrain the United States from such sale, to divest the Government of its title and vest it in the State." The ruling of the court was that "the United States is therefore the real party affected by the judgment and against which in fact it will operate."

In Oregon *vs.* Hitchcock (202 U. S., 60) the court, on page 70 of its opinion, said:

> "Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed."

And also points out that there has been no finding or adjudication of the Land Department touching said lands, hence, "until the legal title passes from the Government," equitable rights are not within the cognizance of the courts.

In Naganob *vs.* Hitchcock (202 U. S., 475) the court declares:

"In this case, as in the *Oregon* case, the legal title to all the tracts of land in question is still in the Government, and the United States the real party in interest herein." * * *

On the other hand, assuming to be correct the theory of the bill, that title passed out of the United States when the list was approved, on December 10, 1895, there is abundant authority for the institution and prosecution of the suit for injunctive relief against the defendants, notwithstanding the fact that they are officers of the United States.

United States *vs.* Peters, 5 Cranch, 115.
Meigs *vs.* McCheery's Lessee, 9 Cranch, 11.
Wilcox *vs.* Jackson, 13 Peters, 498.
The Governor of Georgia *vs.* Madrozo, 1 Peters, 110.
Osborne *vs.* Bank of U. S., 9 Wheaton, 738.
Grieser *vs.* McDowell, 6 Wallace, 363.
Davis *vs.* Gray, 16 Wallace, 203.
Lee *vs.* Kaufman and Strong, 106 U. S., 196.
Western U. T. Co. *vs.* Henderson, 68 Fed., 590, and cases cited.
Sharp's R. M. Co. *vs.* Rowan, 34 Conn., 333.
91 American Decisions, 730.

The case of Davis *vs.* Gray (*supra*) was a suit against "one Davis, Governor of the State of Texas, and Kuehle, Commissioner of the Land Office of the State," averring among other things that they had been issuing, and propose to continue to issue, patents under the Constitution and laws of Texas, but contrary to the contractual rights of the corporation for which the plaintiff was receiver; "that the said provisions of the Constitution of Texas and the said ordinance of convention impaired the obligation and validity of the said contract * * * and were in so far contrary to article 1, section 10, of the Constitution of the United States * * * and were in so far null and void; and that the acts of the Governor of the State and Commissioner of the

Land Office in issuing such patents were without authority of law and illegal, and that any repetition of the same should be perpetually restrained." The bill prayed an injunction accordingly.

The defendants demurred, among others, on the following grounds:

> "1st. Because it did not appear from it that the defendants, or either of them, had any direct or personal interest in the lands which were the subject-matters of this suit; but, on the contrary, that they were sued in their official capacities only; and that the lands were a part of the public domain of the State of Texas, which was not and could not be made a party to this suit.
>
> "2nd. Because it did not appear that while under the amendment II to the Constitution of the United States (which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of a foreign State'), the court could have no jurisdiction as between the complainant and the State of Texas, jurisdiction existed in a suit against two of the officers of said State in their official capacity alone, to decree portions of the Constitution of the State, which had been accepted by the Congress of the United States, and which the defendants were sworn to obey, void."

The demurrer was overruled by the court below, whose action was affirmed by this court. In this connection this court said:

> "A few remarks will be sufficient to dispose of the jurisdictional objections as to the appellants.
>
> "In Osborn *v.* The Bank of the United States (9 Wheaton, 738) three things, among others, were decided:
>
> "(1) A circuit court of the United States, in a proper case in equity, may enjoin a State officer from executing a State law in conflict with the Con-

stitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(2) Where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the State in all respects as if the State were a party to the record.

"(3) In deciding who are parties to the suit the court will not look beyond the record. *Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.* A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." (Italics supplied.)

"Dodge *v.* Woolsey (18 How., 331), The State Bank of Ohio *v.* Knopp (16 How., 369), The Jefferson Branch Bank *v.* Skelly (1 Black, 436), Ohio Life and Trust Co. *v.* Debolt (16 How., 432), and The Mechanics' and Traders' Bank *v.* Debolt (18 How., 380), proceeded upon the same principles, and were controlled by that authority, with respect to the jurisdictional question arising in each of those cases as to the defendant."

The case of Lee *vs.* Frederick Kaufman and Richard P. Strong (*supra*), an action in ejectment, was originally brought in the Circuit Court of Alexandria County, Virginia, and the defendants had no interest whatever in the property, known as the Arlington estate, but were in possession thereof as officers of the United States, which claimed title under a tax deed. The case was promptly removed by writ of *certiorari* to the circuit court of the United States. The United States, "while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court" below. The point was raised and urged throughout the litigation that the United States was the real party in possession and could not be sued with-

out its consent. The court, finding that the tax title was invalid, held that the action could be maintained against these officers of the United States who were in possession of the land as its officers, employees, and agents, citing in support of the decision many of the decisions of this court mentioned above, including the cases of Davis *vs.* Gray and Osborn *vs.* Bank of the United States, which were quoted with approval.

In distinguishing between the English and American doctrine, this court said:

> "Under our system the people, who are there (in England) called subjects, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he must yield the rights which the law secures to him when it is well administrated. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

In referring to the doctrine laid down in Osborn *vs.* Bank, this court quoted with approval, among other things, the following:

> "In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depends not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule is given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into and deciding on the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?"

Defendants, by their action in entering into a discussion of the merits of the propositions of law which they urge in opposition to the theory of the law on which the bill is based, admit the necessity for consideration of these questions on their merits by this court and therefore, incidentally, the jurisdiction of this court to determine the same.

The bill does not present a case which should be disposed of by this court on motion to dismiss for want of jurisdiction, and thus deprive the plaintiff of its rights to present and argue its case orally, as would be allowed, for instance, on demurrer.

Defendants not only seek by the motion to deprive the plaintiff of this right, but they go further than they would be allowed to go on demurrer, and seek to set up in their brief (pages 12 and 13) matters of defense which do not appear upon the face of the bill or in the exhibits thereto, but in a so-called decision of the Secretary of the Interior, rendered subsequent to the loss by him of jurisdiction in the premises, as to which the plaintiff would clearly have the right to introduce evidence in rebuttal.

The pending motion should therefore be dismissed and the defendants should be required to demur or answer independently of the views which the court may take of the other propositions involved in advance of the oral argument, either upon demurrer or on the record upon its merits, as the same may hereafter be presented.

The Constitution gives this court original jurisdiction of a suit on the part of a State of this Union against a citizen or citizens of a different State or of different States. According to the averments and theory of the bill, both of the defendants are proper defendants to be brought into this court to respond to the complaint of the plaintiff against them for acts which they are about to do which are charged to be unlawful and to deleteriously affect the interests and rights of the plaintiff unless restrained under and in accordance with the prayers of the bill.

Therefore the question as to whether or not this court has jurisdiction of the suit depends upon the correctness of the proposition of law, to the effect that the title passed out of the United States on December 10, 1895.

II.

The legal title to the land passed to the plaintiff upon the approval of list No. 51, on December 10, 1895, when the Land Department lost jurisdiction thereof; which jurisdiction could alone have been regained by successful suit on the part of the United States, brought prior to the statutory limitation provided by the act of Congress of March 3, 1891 (26 Stats., 1093).

The grant of March 2, 1849 (9 Stats, 352), as set forth in the second paragraph of the bill, was entitled "An act to aid the State of Louisiana in draining the swamp lands therein." By the first section thereof there was granted *in præsenti* to the plaintiff, for the purposes stated, "the whole of those swamp and overflowed lands which may be or are found unfit for cultivation."

By section 2 it is provided—

> "That as soon as the Secretary of the Treasury (now Interior) shall be advised by the Governor of Louisiana that the State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the Surveyor-General thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of same to be made out and certified by the deputies and Surveyor-General to the Secretary of the Treasury (now Interior), *who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana*, subject to the disposal of the legislature thereof," etc. (Italics supplied.)

The third and last section of the act specifies that when the greater part of any legal subdivision is of a swampy character the whole subdivision must be listed. The first proviso *expressly excludes all lands surveyed under the acts of March 3, 1811, or May 24, 1824.* The second proviso places upon the State the expense of surveying and selecting the lands passing under the grant.

The bill avers that the lands were all of the character defined by the grant; that none of them were surveyed under the acts of March 3, 1811, and May 24, 1824, or either of said acts; that they were selected and certified and reported by the Surveyor-General under and pursuant to the grant of March 2, 1849; that the Commissioner of the General Land Office, by his decision of September 13, 1893, held that the executive order of December 20, 1838, operated so as to prevent the land from passing to the State under the grant of March 2, 1849, or the subsequent grant of September 28, 1850 (9 Stats., 519); that on appeal to the Secretary of the Interior this decision was reversed by Secretary Smith under date of October 31, 1895 (21 L. D., 357), copy of which decision constitutes Exhibit A to the bill, it being held by this final decision that the land passed by the grant of March 2, 1849, and was regranted by the subsequent grant of September 28, 1850, and the General Land Office was directed that the lands "be certified to the State of Louisiana under the swamp-land grants."

The bill further avers that, pursuant to said decision, the lands were described by the Commissioner in list No. 51, "in accordance with the rules and regulations," and it was recommended by the Commissioner to the Secretary that "list No. 51 *be approved;*" and that thereafter, on December 10, 1895, said list was approved by Secretary Smith, who used, among others, the following words:

> "The foregoing list No. 51 of swamp lands selected * * * is hereby *approved to the State of Louisiana* under the act of *March 2, 1849,*" etc. (Italics supplied.)

According to the terms of said grant of March 2, 1849, section 2, *"on that approval the fee simple to said lands shall vest in the said State of Louisiana,* subject to the disposal of the legislature." (Italics supplied.)

The legal title passes as completely by certification, if patent is not expressly required by law, as though patent actually issued.

Garrigues *vs.* A., T. and S. F. R. R. Co. (6 L. D., 543).

Roberts *vs.* Oregon Central Military Road Co. (19 L. D., 591).

The certification of land is equivalent to a patent therefor.

Wright *et al. vs.* State of California (8 L. D., 24).

Such certification exhausts the jurisdiction of the Land Department over the land.

In Re Louisiana, 1 Lester, 554.

Patrick Daily case (8 L. D., 471).

State of California *vs.* Baddy (9 L. D., 636).

Where a grant does not require the issuance of a patent, the certification of lands is equivalent to a patent, divests the Land Department of all jurisdiction over them or the title thereto, and it is in effect a decision that the lands thus certified are in fact subject to the grant, and the validity of such action can only be questioned in the courts.

Smith *et al. vs.* P. L. and L. S. Ship Canal Co. (11 L. D., 475).

Patent is the favored and more usual form of conveyance, especially as between the Government and individuals, but sometimes an act of Congress will pass the fee (Strother *vs.* Lucas, 12 Peters, 410-454; Ryan *vs.* Carter, 93 U. S., 78). The law sometimes makes a certified list of lands

operative to transfer title to the grantee (Frasher *vs.* O'Connor, 115 U. S., 102). The power is with Congress to declare the form in which title which has been granted by the United States shall be evidenced. This Congress did by the act of March 2, 1849.

The Supreme Court has upheld as fundamental the doctrine that so long as the legal title to these (public) lands remains in the United States and the proceedings to acquire it are as yet *in fieri,* the courts will not interfere to control the exercise of the power thus vested in that tribunal.

> "But that when by the action of these officers and the President in issuing a patent to a citizen, the title to the lands has passed from the Government, the question as to the real ownership of them is open in the courts to all the considerations appropriate to the case. And this is so whether the suit is by the United States to set aside the patent and recover back the title so conveyed, as in United States *vs.* Stone (2 Wall., 525), or by an individual to cause the title conveyed by the patent to be held in trust for him by the patentee, as in Johnson *vs.* Towsley, 13 Wall., 72."
>
> United States *vs.* Schurz, 102 U. S., 378-396.

In Bicknell *vs.* Comstock, 113 U. S., 149, the principle is reaffirmed (quoting U. S. *vs.* Schurz, *supra*), "that where the patent has been executed by the president and recorded in the General Land Office, all power of the Executive Department over it has ceased." It was further said:

> "It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States if it had not been divested before."

This is likewise absolutely true with respect to a list of swamp lands in Louisiana, granted by the act of 1849, to which has been attached the certificate of approval of said list by the Secretary of the Interior.

The custom of the Land Department respecting the approval of lists under the act of 1849 is that the list approved by the Secretary remains upon the files of the General Land Office as the official record of the act done, that office being the custodian of all such records.

In United States *vs.* Schurz, *supra,* speaking of the period when a transfer of title from the United States to another owner results from the action of the officers of the Land Department, the court says (p. 402):

> "It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the Government, or, to speak in technical language, the legal title has passed from the Government and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title."

In that case the question was as to the effect of the delivery or non-delivery of a patent which the law of the transaction constituted the appropriate means of evidencing the transfer of the title. The acts of Congress governing that case "provided for the record of all patents for land in an office and in books kept for that purpose." That having been done, the court said (p. 403):

> "This, then, is the final record of the transaction—the legally prescribed act which completes what Blackstone calls 'title by record'; and when this is done the grantee is invested with that title. * * * No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus."

In the case at bar the law (act of 1849) in express terms makes the approval of the list by the Secretary of the Interior the vehicle by which the fee simple vests in the State. It remains in all cases, as before stated, in the possession of the General Land Office, precisely as do all the official records, papers, and files of that office.

The defendant Garfield, as Secretary of the Interior, was not only without lawful power and authority to recall and vacate the approval of said list No. 51, and the proposed action of the Land Department in attempting to cancel said list and make other disposition of the land, as charged in the bill, is not only likewise illegal, but the United States itself has specifically and distinctly waived and surrendered any possible right it may have had to institute any proceedings through the courts to that end.

By the act of March 3, 1891 (26 Stats., 1093), it is provided:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

This statute by analogy, if not by its expressed terms, applies with equal force where title passes by approval, as provided for by the act of March 2, 1849, as by patent.

This principle has long been recognized by the Land Department itself, as shown by the departmental authorities cited above.

The Land Department having lost jurisdiction by reason of the fact that the title passed from the United States to the plaintiff upon the approval of list No. 51, embracing said land, on December 10, 1895, it is clearly unlawful for the defendants to undertake the unlawful acts and proposed action of which complaint is made, and it is the duty and within the jurisdiction of this honorable court to restrain

the defendants in accordance with the prayer of the bill for injunctive relief.

Defendants' Contention.

The defendants contend, in opposition to the above theory of vestiture of title and loss of jurisdiction by the Land Department:

First. That the subsequent *general* grant of September 28, 1850 (9 Stats., 519), so repealed and amended the *local* act of March 2, 1849 (9 Stats., 352), as that title could only pass upon delivery of patent issued under and pursuant to said *general* grant of 1850.

Second. That, even if the first contention is not well founded, the *general* act of August 3, 1854 (Sec. 2449, U. S. R. S.), operated so as to amend and modify the local act of March 2, 1849, as that the certification required must comport with said *general* act of August 3, 1854.

These two propositions will be discussed in the order of their statement.

To sustain the first proposition, it would be necessary for the court to put aside both the contemporaneous construction and the uniform departmental construction for more than half a century to the contrary, and place the State of Louisiana and its grantees, in respect to hundreds of thousands of acres which have been certified to it under the act of March 2, 1849, at the mercy of officers of the Land Department, who, as in the case at bar, utterly disregard the doctrines of *stare decisis* and *res adjudicata*.

The act of March 2, 1849, was a *local* statute, confined in its scope to certain lands in Louisiana, and the lands surveyed under the acts of March 3, 1811, and May 24, 1824, *were expressly excepted from the operation of the grant.* While it was a grant *in præsenti,* the mode for identification

was set out and the expense thereof was placed on the State, and title passes *on* approval of list.

The grant of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," was a *general* statute, embracing all of the public-land States then in the Union.

It did not refer to the act of March 2, 1849, or modify its provisions in any particular. It contained no exception of lands surveyed under the acts of March 3, 1811, and May 24, 1824. It undoubtedly granted such lands in Louisiana which may have become swampy between March 2, 1849, and September 28, 1850, and also such swamp lands in Louisiana as were surveyed under the acts of March 3, 1811, and May 24, 1824. The duty and expense was imposed upon the Secretary of the Interior to identify the lands passing under the general grant of 1850, and the legal title to such lands, so for the first time granted by the act of 1850, passes by patent; but, as to those lands in Louisiana which were theretofore granted to the plaintiff by the act of March 2, 1849, the different mode of procedure for the identification of the lands continued in force, the State paid the expense of segregation surveys and for employment of deputies, and title continued to pass by approval of lists thereof.

Such has been the uniform departmental construction and practice, and the two grants have been administered separately as two separate and distinct grants, including the two distinctive modes provided in the grants for passing title.

As early as December 23, 1851, Mr. Stewart, then Secretary of the Interior, instructed the Commissioner of the General Land Office that the acts of March 2, 1849, and September 28, 1850, were not to be construed *in pari materia;* that "the act of March, 1849, had reference to Louisiana alone, while that of September, 1850, is entirely different."

1 Lester's Land Laws, Regulations and Decisions, p. 549.

In his decision dated January 14, 1856 (1 Lester, 554), addressed to the Commissioner of the General Land Office, Mr. Secretary McClelland held that the act of March 2, 1849, covers all the swamp and overflowed lands in Louisiana except the tracts specified and referred to in the second and third sections of the act.

> "That the approval of the list directed to be prepared under act of 1849 exhausts the power of the Secretary of the Interior over the subject-matter, and he can no more, of his own motion, revoke or cancel any part of an approved list under that act, after it has passed from him, than a patent for land after its delivery; that the act of 1849 is not merged in the act of 1850, but each is to be executed according to its special tenor and provisions, the latter being merely cumulative and embracing land which was excepted from the operations of the former."

This principle is recognized and followed by numerous decisions of the Land Department down to and including the latest departmental decisions on the subject.

In *State of Louisiana* (32 L. D., 270), rendered October 1, 1903, the Department held:

> "The legal title to the lands granted by the act of 1849 passes to the State upon the approval by the Secretary of the Treasury (now Secretary of the Interior) of lists to be made out and certified by the deputies and Surveyor-General, and to those granted by the act of 1850 by the issuance of patent under the direction of the Secretary of the Interior."

The direction of that decision was that all pending selections under the swamp-land grants of the State of Louisiana—

> "will be approved or patented to the State as they may have been selected under the grant of 1849 or 1850."

In State of Louisiana (unreported), rendered December 23, 1904 (subsequent to his effort to annul the list No. 51 herein, under date of June 6, 1904), Secretary Hitchcock, in passing upon an appeal from the action of the Commissioner of the General Land Office refusing the application of the plaintiff for a segregation survey under the act of March 2, 1849, and reversing the same, said:

> "To this end, a provision of the act of 1849 may be invoked. Section 2 of that act provided that the officer charged with the identification of the lands granted thereby to the State of Louisiana should upon the advice of the Governor, that the State had made the necessary provision to defray the expenses, cause a personal examination to be made, under the direction of the Surveyor-General, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation.
>
> "This provision of the act of 1849 was not repealed by the act of 1850, and is in full force and effect in the State of Louisiana."

These departmental decisions, to the effect that the *local* act of March 2, 1849 (9 Stats., 352), was neither repealed, modified, nor affected by the *general* act of September 28, 1850 (9 Stats., 519), are borne out by the provisions of the United States Revised Statutes, wherein the *general* act of September 28, 1850, is codified into sections 2479, 2480, and 2481, and no reference whatsoever is made to the *local* act of March 2, 1849, which is left in its original form without any codification whatsoever. Said *local* act of March 2, 1849, therefore remains in full force and effect as originally enacted (U. S. R. S., sections 5595, 5596, and 5597).

The judgment rendered by the Secretary of the Interior in the form of this decision of October 31, 1895 (21 L. D., 357), which was executed by the approval of said list No. 51 on December 10, 1895, was to the effect that the land first passed under the grant of March 2, 1849 (under which the

lands were identified and reported by the office of the Surveyor-General), and also by the subsequent grant of September 28, 1850.

In contemplation of law, it is contended that the first grant *in præsenti* governs, because where two acts of grant, one of an earlier and another of a later date, are each broad enough in their terms to embrace the same property, under the well-known rule of law, title must be regarded and held to have passed by the first grant, under the principle, *prior est tempore, potior est in jure.*

9 Opin. Att'y Gen., 254.
Wright *vs.* Roseberry (121 U. S., 488-502).
Rogers *vs.* United States (185 U. S., 83).

It thus appears, beyond question, that the land not falling within the exception from the grant of March 2, 1849, but expressly embraced within its terms of grant, having been selected and identified under that grant, and said grant being unrepealed or modified by the act of September 28, 1850, or the Revised Statutes, the appropriate means for the passing of legal title was and remained by approval, under section 2 of said act of March 2, 1849, which provides that "on that approval the fee simple to said lands shall vest in the said State of Louisiana."

The use of the words "as supplemented and enlarged by the act of September 28, 1850," in said approved list, in no wise limited, restrained, or affected the operative force or legal effect of the approval, "under the act of Congress of March 2, 1849"; its manifest object was to emphasize the conclusion of the Department, as a matter of law, as distinctly stated in the decision of October 31, 1895 (21 L. D., —), pursuant to which the list was submitted for approval, that said lands were granted to the State not only by the act of 1849, under which they had been identified, but the act of 1850 was sufficiently broad to have embraced such lands also, had they not been granted by said act of 1849.

Certain it is that said words could in no wise restrain, limit, or qualify the approval, and the consequent vestiture of title under the act of March 2, 1849. Indeed, the reference to the act of 1850 may more properly be regarded as given by way of further assurance that the lands did not fall within any exception contained in the grant of swamp lands made by the act of 1849 or that of 1850; but, being within the scope of both of these grants, they were accordingly approved to the State in the manner provided and specified in the said earlier grant.

As has been shown, the language used in the certificate approved by Secretary Smith embraced everything requisite to an approval under the act of March 2, 1849. Such additional expressions, not required by that statute to be used, however, may be treated in law as mere surplusage and may be wholly disregarded in determining the legal effect of the approval under the act of 1849.

Kountz *vs.* Omaha Hotel Co. (107 U. S., 378).

The defendants apparently recognize the weakness of their contention on this point by going outside of the record before the court for expressions contained in the letter from the Honorable Secretary of the Interior to the Commissioner of the General Land Office, dated June 6, 1904, long subsequent to the loss of jurisdiction by the Land Department, quoted in part on pages 12 and 13 of defendants' brief. If this defense is to be urged at all, it can only be at the hearing of the case on its merits, when the documentary evidence upon which the Secretary arrives at his conclusions can be presented, as findings of fact by the Secretary of the Interior after loss by him of jurisdiction is not binding upon this court.

Assuming for the sake of argument that the register of the State land office did ask the Land Department to permit an amendment of the list to the extent of adding other lands to it, the misconception or error of this administrative

officer of the State, with no power to bind it to the extent of reconveyance of the title which had theretofore passed to the State by the approval of the list, cannot justify the erroneous conclusion reached by the Secretary of the Interior as to the legal effect of the approval theretofore made, as defined by the statute itself.

The first proposition of the defendants, under discussion, is therefore untenable; the act of 1849 was not in anywise repealed, amended, modified, or affected by the act of 1850, and the legal title passed by the approval of the list, on December 10, 1895, under the terms of said grant.

Act of August 3, 1854, Inapplicable.

The second, or alternative, contention of the defendants is likewise untenable.

The proposition of defendants is stated on pages 13 and 14 of their brief as follows:

> "There is another reason for concluding that the legal title has not passed. By an act of August 3, 1854, (R. S., sec. 2449), Congress provided:
>
> " 'That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of several States and Territories, *and where such law does not convey the fee-simple title of the lands*, or require patents to be issued therefor, the list of such lands which have been, or may hereafter be *certified by the Commissioner of the General Land Office*, * * * shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby.'
>
> "In the case now before us there was no such certificate." (Italics supplied.)

The purpose of this *general* statute, which has never before been held by the Land Department as applicable to lands granted by the *local* act of March 2, 1849, was clearly

that of supplying a means for the conveyance of the legal title to lands which had been or might be granted to States or Territories by statutes *containing no specific provision for the passage of such legal title*. Such a statute was involved in the case of Weeks *vs.* Bridgman (159 U. S., 541).

This contention is borne out both by the language of the statute italicized above and also by the title of the original statute, entitled "An act to * * * vest the title in fee of lands which have been or may be certified," etc. (10 Stats., 346).

The statute clearly does not apply to lands passing under the grant of March 2, 1849, which contained no provision for certification "by the Commissioner of the General Land Office," but does contain the specific provision for the passage of the legal title, contained in the second section of the grant, to wit, *"on that approval* (of list by Secretary), *the fee simple to said lands shall vest in the State of Louisiana."*

Take the lands which were selected under the act of 1849 and listed and approved between March 2, 1849, and August 3, 1854. The fee-simple title had clearly vested in the State "on that approval." Could the retroactive provisions of the act of August 3, 1854, serve to "vest the title in fee" which had already been vested?

The act of 1849 was a grant *in præsenti*, the legal title to the lands granted to pass upon identification and to be evidenced by the approval by the head of the executive department having jurisdiction over public lands; the title to be the best "in fee simple," as it was contemplated by the grant that the lands would be sold by the State for funds with which to carry on the work of reclamation by drainage. Suppose, for the sake of argument and not otherwise, that it was within the power of Congress to so amend this act as to vouchsafe a less stable title, such as approvals under the act of 1854 are regarded to be, is it reasonable to suppose that Congress would not have made more clear its purpose so to do than was done by the act of 1854? No reference is

made therein to the act of March 2, 1849, and, as shown, said grant was not subject to the infirmity sought to be cured.

List 51 was approved subsequent to the codification of said act of 1854 as section 2449 of the Revised Statutes of the United States. As shown above, this codification expressly, by sections 5595, 5596, and 5597, excluded *local* acts of the character of the act of March 2, 1849, which act was not codified in the Revised Statutes, although the general swamp-land grant of September 28, 1850, and the amendments thereto were so codified in sections 2479, 2480, and 2481.

By section 5595, "Title LXXIV, Repeal Provisions" of the Revised Statutes, it is declared that—

> "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy three * * *."

Section 5596 is as follows:

> "All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, *any portion of which is embraced in any section of said revision*, are hereby repealed and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, That the incorporation into said revision of any general and permanent provisions, taken from an act making appropriations, or from an act containing other provisions, of a private, *local* or temporary nature, shall not repeal, or *in any way affect any* appropriation, or any provision of a private, *local*, or temporary character contained in any of said acts, *but the same shall remain in force; and all acts of Congress passed prior to said last-named day, no part of which are em-*

braced in said revision, shall not be affected or changed by its enactment." (Italics supplied.)

Section 5597:

> "The repeal of the several acts embraced in said revision shall not affect any act done, or right accruing or accrued, or any suit or proceedings had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal in any manner affect the rights of any office or change the tenure thereof."

It thus clearly appears that the act of August 3, 1854 (U. S. R. S., sec. 2449), is in no way applicable to lands passing or approved to the State by the Secretary under the act of March 2, 1849.

It is contended by the former Secretary of the Interior, in the extract quoted on pages 14 and 15 of brief of counsel for defendants, that the application of the act of 1854 to lands granted by the act of 1849 would constitute no material change in the original grant, by requiring the Commissioner of the General Land Office to certify the lists, presumably as approved by the Secretary of the Interior, under and in accordance with his final decision thereon. As the title passes under the grant upon approval of the list by the Secretary, what the Commissioner could do would be purely ministerial and would not affect the question of the passage of the title any more than would his ministerial acts in delivering a recorded patent issued under the settlement laws.

While it is denied that the act of 1854 applies to lands passing under the grant of 1849, as has been shown; yet, even if it did, it would not be within the jurisdiction of the defendant Garfield to revoke the approval and have the defendant Ballinger cancel the list No. 51, which had been approved by his predecessor, Honorable Hoke Smith, under date of December 10, 1895.

In the case of Noble *vs.* Railroad (147 U. S., 165, 176), cited with approval in the case of Weeks *vs.* Bridgman (159 U. S., 54), this court said:

> "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier in *United States v. Stone*, 2 Wall., 525, 535, 'one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a court.' "

This doctrine was not overruled or modified in the case of Weeks *vs.* Bridgman (*supra*), which involved an action brought in a State court to determine the adverse claims of the parties, both of whom stood on paper title. One of them relied upon a certification under the act of 1854, based upon a railroad grant to Minnesota by act of May 22, 1857, and the other under a patent of the United States, issued by authority of law, to a pre-emption claimant. This court found that the claim of the pre-emptor having, by decision of the Secretary of the Interior of August 30, 1861, been held to have attached prior to definite location of the line of the railroad, the title to the land did not pass under the congressional grant to the State, and that the inclusion of the land in lists certified to the State on October 25, 1864, under the act of August 3, 1854 (10 Stats., 346), as a part of the lands granted by the act of 1857, "was ineffectual," and that as against the pre-emption claimant "the certification had no operative effect."

The case of Brown *vs.* Hitchcock (173 U. S., 473), cited by counsel for defendants, involved lands selected under the grant of 1850, requiring delivery of patent to pass title. Until title passed out of the United States, this court very properly held that it had no jurisdiction.

It has thus been shown that the act of August 3, 1854, does not apply to lands granted under the act of March 2,

1849, and that, even if it did, the approval of list No. 51 by the Secretary of the Interior on December 10, 1895, passed the title to the plaintiff, and it is beyond the power and lawful authority of the defendants or either of them to take action, of which complaint is made herein, deleteriously affecting the rights and interests of the plaintiff.

III.

The Lands Involved Passed to the Plaintiff under the Grant of March 2, 1849 (9 Stat., 352).

The defendants in their brief seek to strengthen their position and turn their motion to dismiss for want of jurisdiction into a general demurrer by undertaking in support thereof to argue the merits of the original proposition, as decided by the Secretary of the Interior on October 31, 1895, (21 L. D., 357), after the statute of limitations has barred any suit which the United States may have instituted within six years from December 10, 1895, when the title passed to the plaintiff "on approval" of the list submitted pursuant to said departmental decision.

While the theory submitted in respect to the effect of the executive order of December 20, 1838, including the land in the Fort Sabine Military Reservation, seems to explain the zeal of the defendants in seeking to set aside a contrary view of the law entertained and decided by Mr. Secretary Smith on October 31, 1895 (21 L. D., 357), in view of the present legal status of the matter, it would seem to be a non-essential question in the case, either at this stage or when it is considered on its merits, as to whether or not land within the limit of a military reservation passed under the swamp-land grant of March 2, 1849.

That the court may see that the original contention of the plaintiff and decision of Secretary Smith is not without merit in this regard, and in view of the argument of counsel

for the defendants in the premises, it is deemed proper to submit the following considerations on this phase of the subject:

Preliminary to a discussion of the effect of the act of Congress of March 2d, 1849, it is deemed proper to refer briefly to certain historical facts affecting the intention of Congress in enacting it.

Unlike the preëmption act of 1830 and other laws passed by Congress subsequently thereto, there was in the act of 1849 no express provision excepting from the operation of the grant lands within the limits of a military reservation. Neither was its language restrictive, as was the case in most, if not all, of the railroad grants; on the contrary, it was broad and comprehensive, as in the school-land grant.

When the United States acquired the territory embracing the present State of Louisiana, it assumed all the duties and responsibilities towards its new subjects which had theretofore rested upon Spain and France. The land bordering on certain rivers and streams within the present limits of this State largely belonged to the Government as late as 1849, and it is a matter of history that Spain and France did not require their subjects to place embankments along the lands not owned by them, but, on the contrary, each of said governments made provision for the proper protection of its citizens and grantees. When the State of Louisiana was admitted into the Union, the Government of the United States retained title to the unsold lands within its borders.

Without reclamation, a large proportion of those lands were worthless and unsalable. Their reclamation, however, did not affect the value of the property belonging to the State, but that of the nation, although sanitary precautions and the protection of the lives and property of its citizens rendered levees, at least, essential.

As early as January 12, 1830, the Committee on Public Lands of the Senate of the United States, in response to a resolution of inquiry, admitted the responsibility of the

Government to these subjects; that the work of reclamation on the part of the citizens and the State would cause an increase in the value of the Government's land without the assumption by it of any of the burdens of taxation, and that both "justice and the interest of the United States required that provision should be made by law for making embankments, bridges," etc., "on the lands owned by the United States in the State of Louisiana," for which purpose a bill was reported. (See Report No. 23, vol. 1, 1st sess., 21st Cong.) This bill was not passed. The Government evaded the responsibility. By the expenditures of the State of Louisiana and its citizens a vast quantity of the Government's theretofore worthless land was rendered salable and sold, and the proceeds were paid to the United States.

As will be seen in the report of Honorable John Wilson, Principal Clerk of Surveys (Senate Executive Doc. No. 68, 1st sess., 31st Cong., vol. 14), the reclamation of the lands sold by the Government in the Western States drained by the Mississippi river very deleteriously affected the interests of Louisiana, in that the waters rushed from the reclaimed lands into the streams more quickly, and thus accentuated, both in frequency and extent, the overflows from the Mississippi. Mr. Wilson, among other things, said:

> "The destruction of property and crops this season by the overflow has been estimated to amount to five or seven millions of dollars, a recurrence of which can hereafter be prevented by these improvements. Moreover, about three or four millions of acres of land will be reclaimed which otherwise would continue to be valueless.
>
> "The expense of making these improvements, as already stated, will be very heavy—much more in fact than can be realized from the munificent grant made by Congress to aid in this object, however liberally that grant may be construed. The balance must be raised by taxing the inhabitants, who have already contributed millions for the purpose, and whose means have been seriously impaired by the

> disasters of the past and present years, unless Congress, regarding the matter in its true light, as one of national importance, should further extend the grant for this purpose, so as to include all the public lands in the State, which, in view of all the circumstances of the case, I respectfully recommend.
>
> "The whole question, it seems to me, has resolved itself into the alternative that relief must be speedily extended or the lowlands of Louisiana abandoned."

It will thus be seen that, although the grant of 1849 was made to aid in the further reclamation of swamp lands in the State, it was in fact founded upon *a valuable consideration;* and, with respect to the lands so granted, the State occupied the position not of a recipient of a gratuity, but of a grantee of that to which it was more than entitled.

It is believed, therefore, that the swamp-land grant should be construed most liberally and beneficially, and that the State be not embarrassed in the matter at bar by a line of authorities which are but an evolution from the construction of statutes either more modern or restrictive in their application, in the disposition of the public lands of the United States than was in the mind of Congress when it enacted the present grant.

The decision of Mr. Secretary Smith is supported not only by a line of decisions of the department, but is also in consonance with the legislative construction to the effect that the swamp-land grant applies as well to swamp and overflowed lands within the limits of a reservation, existing at the date of the grant, as it does to swamp lands outside thereof.

Where the fee is in the Government, the existence of a reservation, even of a substantial nature, will not inhibit the disposition by Congress of any portion of the land by grant *in præsenti*, even though immediate possession is withheld. Congress intended to grant, and did grant, the swamp lands in Louisiana, both within and without the limits of military reservations.

Section 1 of the grant of March 2, 1849, reads as follows:

> "That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the *whole* of those swamp and overflowed lands which may be or are found unfit for cultivation shall be, and the same are hereby, granted to that State." (Italics supplied.)

In Ham *vs.* Missouri (18 How., 126) the question of law involved was as to whether or not the school grant, under the act of March 6, 1820, for Missouri was rendered inapplicable to certain land (thereafter in terms confirmed to the private-land claimant by special act of Congress), by the proviso in the 10th section of the act of March 3, 1811, to the effect:

> "That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana, and filed in his office for the purpose of being investigated by the commissioners appointed to ascertain the rights of persons claiming land in the Territory of Louisiana."

This court said (page 132):

> "It may well be asked whether the language and object of the latter can be made to import anything beyond a temporary suspension of the sales of the lands intended for sale, for the simple purpose of investigation; and much more, whether the 10th section of the act of 1811, and the proviso thereto, can be interpreted to mean a denial to itself by Congress of the right and power to sell or to give, either upon satisfactory evidence of the invalidity of any opposing claim, or upon considerations of public policy, the land embraced within the suspension.
>
> "Such an interpretation, as it is not warranted by the language of the acts of Congress, seems not to accord either with considerations of justice or policy.

> Suppose that Congress, after the passage of the law of 1811, should become satisfied of the groundless nature of the claim presented to the commissioners, and should be convinced further, not only of the benefits to result from appropriating the subject of that claim to purposes of education, but also of their having pledged that subject to such purposes, it cannot be questioned that the power to reject or disregard an unfounded claim, and to comply with a previous and just obligation, remained in a plenary and unimpaired extent in Congress, and that this right and obligation could in no degree be affected by a mere agreement to investigate."

This court concluded that the provision for schools in the act of 1820 attached to the land, notwithstanding the legislative reservation, and that the title thereunder was paramount and superior to that sought to be granted to the private-land claimant by an act of Congress passed subsequently thereto.

In Beecher *vs.* Wetherby (95 U. S., 517) the question of law involved was whether or not the ownership of the lands by Indians under treaty at the date of the school land grant of August 6, 1846 (9th Stat., 56), and treaty reservation thereof for them at date of survey, inhibited the passage of the land under the grant. It was found by the court that by treaty of 1825 the land was recognized "as belonging to the Monominee tribe," which "embraced the section in controversy in this case;" that—

> "In 1831 the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed

> by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race."

As to the nature of the claims of the Indians, the court quoted from a former decision to show that—

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without a further grant."

In the case of the State of Michigan (8 L. D., 308) it appeared that prior to the date of the grant the land, as in the case at bar, had been reserved by executive order for the purpose of supplying fuel for the garrison at Fort Mackinaw, and so remained until after the act of July 5, 1884, *in which express provision was made for the sale of the lands in said reservation*, the proceeds therefrom being constituted a fund for a specific purpose. Though surveyed prior to the grant, the State did not select the land under the swamp-land grant of 1850 until subsequent to said act of 1884.

The question was sharply presented before the department as to whether or not the reservation defeated the operation of the grant. After a most exhaustive discussion of the whole subject, the conclusion reached was that—

> "It is therefore not inconsistent with the theory of a grant *in præsenti* that the full fee and present enjoyment of rights under the grant should be subject to a contingency."

The department cited, among other cases, that of Butte *vs.* Northern Pacific Railroad Company (119 U. S., 55), in which was involved the question whether lands to which the Indian title had not been extinguished (and hence in reservation) passed by the grant to the company:

> "The court held that the grant to the road operated to convey the fee in said lands to the company subject

> to the right of the occupancy of the Indians. * * * The land was therefore appropriated and reserved for the use of the Indians until public policy and the general welfare of the Indians demanded its extinguishment. How long that would or should continue no one could tell. But yet the grant passed the fee to the company in such lands upon the filing of map of definite location, 'subject to that condition, so far as the Indian title was concerned.' "

The Interior Department reached the conclusion in this Michigan case that—

> "The swamp-land grant is a grant *in præsenti* vesting in the State the fee simple to all lands of that description at the date of the passage of the act, subject to the use of the Government or other uses, for which a reservation is made, so long as that reservation shall continue."

In the State of Louisiana (17 L. D., 440) there was before the Interior Department such a reservation under 10th section of the act of March 3, 1811 (2 Stat., 662), as is discussed in detail in connection with the case of Ham *vs.* State of Missouri (cited *supra*), and which reservation remained until the passage of the act of March 2, 1889. The department on this point (page 443), among other things, held:

> "The reservation of these lands did not affect the grant to the State only so long as the lands were in reservation. In order to defeat the grant to the State under the act of 1850, it must appear that the lands had been sold by the United States prior to the date of said act. The reservation in this case was for a special purpose * * * and when that purpose was subserved the lands not taken under the Spanish grants were subject to selection by the State. The reservation in this case is the same in this respect as that referred to in 18th Howard, page 126, in the case of Ham *v.* Missouri, wherein the Supreme Court decided that a mere reservation from sale is not sufficient to defeat the grant; there must be a sale or other disposition equally efficient, final, and irrevocable.

> "So I conclude that because of the fact that these lands had been held in reservation on account of the alleged grants hereinbefore referred to, the right of the State to take these lands was not defeated thereby, but the title in the State to said lands really vested at the date of the granting act. *All that was necessary was the identification of the lands which passed under the grant,* and when identified the title became perfect as of the date of the act. (121 U. S. 500.) The identification could not be made during the existence of the reservation, but this obstacle to the State's selection did not in anywise impair the grant, and when the reservation was removed the State had the right to make selection of the swamp and overflowed lands within said reservation."

In *State of Wisconsin* (19 L. D. 518), the Interior Department, after stating that "by the treaty of October 4, 1842 (7th Stats. 591), ceding to the United States certain country described by bounds in article 1, the Indians stipulated for the right of occupancy of the lands ceded until required by the President to remove," and that they were actually in possession under that provision at the date of the swamp-land grant, and that the lands were thereafter set apart as a reservation under the treaty of September 30, 1854 (10 Stat. 1109), said:

> * * * "the title to the lands in question was in the United States at the date of the swamp land grant in 1850. It therefore passed by said grant, but subject to the right of Indian occupation, for that was the character of the holding by the Government, and it could pass no more than it had."

The Secretary cited with approval the cases of *Beecher vs. Wetherby* (*supra*), and *United States vs. Thomas* (151 U. S. 577), and said:

> "The decisions cited were dealing with the school grant, while we have here under consideration the swamp land grant; but the two grants are of equal dignity and are similar in character so far as the

> passing of the title is concerned, and the reasoning of these cases applies to this. Furthermore, the case last cited involved a consideration of the rights of a band of the Chippewa Indians; the matter before me relates to the rights of another band of the same tribe, holding its rights under the same treaties. It is, therefore, directly in point, and is authority for saying that by the grant of 1850 the State of Wisconsin acquired the title to the swamp land in the Lac de Flambeau reservation, subject to the right of Indian occupation—the mere naked fee, without the right to occupy until the Indian right shall have been extinguished."

In the case of the *Stockbridge and Munsee Indians vs. Wisconsin* (25 L. D., 17) the Honorable Assistant Attorney General, in an opinion, which was approved by the Secretary of the Interior, under date of July 12, 1897, very carefully reviewed the whole question. The status of the land there involved was almost identical with that occupied by the Indians in *Beecher vs. Wetherby* (*supra*), as considered by the Supreme Court, except that the claim of the State was asserted under the swamp-land grant of 1850, and that the lands had been actually allotted to Indians, who had settled thereon in good faith and were entitled to patents but for the said adverse claim of the State. In his opinion, after discussing with approval the cases of the *State of Michigan, Beecher vs. Wetherby, United States vs. Thomas,* and *State of Wisconsin* (*omnia supra*), the Assistant Attorney General said:

> "The land involved in the case of Beecher *v.* Wetherby, *supra*, also came within the letter of the law directing the sale of the said two townships, but the Supreme Court in that case said: 'The act of Congress of February 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee Tribes must, therefore, be held to apply only to those portions which were outside of section 16. It will not be supposed that Congress intended to authorize a sale of lands which it had previously disposed of.

> The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.'
>
> "So in this case the title to the tracts in question had passed out of the United States, and Congress had no control over that title for authority to declare that it had vested elsewhere than in the grantee State."

The opinion in that case further says:

> "The only conclusion to be deduced from these authorities is that the State took the fee to this land at the date of the grant of September 28, 1850, but that its right to possession was held in abeyance until such time as that the Indian right of occupancy should be surrendered by them or otherwise ended by the United States."

Again, in the case of the *State of Florida* (26 L. D., p. 117), the Assistant Attorney General had occasion to pass upon the question as to the effect of an Indian title on the grant of September 28, 1850, and, again considering the matter, among other things, said:

> "This question was presented in the matter of the Stockbridge and Munsee Indians *v.* State of Wisconsin, and, in my opinion of July 12, 1897 (25 L. D., 17), it is discussed and the authorities bearing upon it are cited and quoted from. Upon further examination I find no reason for a conclusion differing from the one then reached, which is formulated in said opinion as follows:" (Quoting last paragraph quoted above.)

Legislative Construction.

Not only is the decision of the Department of October, 1895, in consonance with this line of court and departmental decisions upon the subject, but it is contended that Congress itself has construed the swamp-land grants in

Louisiana to have applied to lands in a state of reservation at the date of said grant by the act of March 2, 1889 (25 Stats., 877), entitled "An act to *restore to the public domain* and to regulate the sale and disposition of certain lands east of the Mississippi river in the State of Louisiana." In that act it was recited that as to certain lands which had been reserved from sale because claimed to be embraced within certain French and Spanish land grants—

> "but which have been, or may hereafter be, decided by the courts of the United States not to be legally embraced within any such land grants claimed to have been granted by the French or Spanish governments within said limits, shall be restored to the public domain and shall be surveyed, and that as soon as said surveys shall have been made all persons who have in good faith settled upon said lands within the limits of said townships at the time of the passage of this act, and who occupy the same, shall be entitled to enter the same, not exceeding 160 acres each, under the provisions of the homestead laws, and shall be admitted to make their proofs and complete their titles in the same manner as if said reservation, because of said grants, claimed *had not been made;* * * * and provided further that nothing in this act shall preclude the State of Louisiana from *enforcing its claim* to said residue of public lands *under the acts of Congress granting swamp lands to the several States of the Union.*" (Italics ours.)

This is a direct recognition by Congress of the fact that the swamp-land grant attached to land in a state of reservation under section 10 of the act of March 3, 1811, and is in consonance with the theory of said decision of October 31, 1895, in that it shows that Congress realized that the existence of said reservation, while not defeating the operation of a grant *in præsenti*, did preclude the State from taking possession; but that upon the passage of an act restoring the land to the public domain the State had the right under

its said grant to "*enforce*" its claim to the swamp lands which attached as of the date of the grant.

Learned counsel for the defendants cite, in support of their contention that "the swamp-land grant was not intended to and did not cover the lands within this military reservation," decisions of this court, which are readily distinguishable from the case at bar.

In *Wilcox vs. Jackson*, 13 Pet., 498, the land had been used by the Government for various purposes from 1804. A reservation by executive order was made in 1824, and a light-house was constructed on the land in 1834. In discussing the question whether the pre-emption claim came within the purview of the law under which it had been allowed by the local officers the court said:

> "The ground of the claim is the right of Beaubean as a settler to a pre-emption under the act of the 19th of June, 1834, entitled, 'An act to revive an act granting pre-emption rights to settlers on the public lands,' passed the 29th of May, 1830. Now, as this act gives to the person claiming under it the benefits and privileges provided by the act of 1830 which it revives, we must look to this last act in order to ascertain what are those benefits and privileges, or, in other words, what is the character of the pre-emption right thus claimed and on what lands the claim is allowed to operate. It authorizes every settler or occupant of the public lands, under the circumstances therein stated, to enter with the Register of the Land Office in which the land lies, by legal subdivisions, a quantity of land not exceeding a quarter section, subject to the following limitations and restrictions: '*that no entry or sale of any land shall be made under the provisions of the act which shall have been reserved for the use of the United States, or either of the several States, or which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever.*" (Italics supplied.)

In *Leavenworth, etc., R. R. Co. vs. United States*, it was held by the Supreme Court that the Osage lands are *expressly excepted by force* of a proviso in the act, reserving all lands heretofore reserved to the United States by competent authority or for any purpose whatsoever.

The decision of the court further shows that the particular grant there in question could not have applied to the Osage lands, construed to be in reservation, because from the very nature of the railroad grant it was "intended" to be of immediate, practical benefit to the grantee; that the lands were granted to be used in the construction of the road as it progressed, but no one would buy them or even loan money upon them so long as the Indian right of occupancy attached to them.

In *Newhall vs. Sanger* (92 U. S., 761), it was held that the railroad grant under which claim was asserted could apply only to public lands—

> "Not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of road is definitely fixed," and "shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any Government reservation or mineral lands or the improvements of any *bona fide* settler."

The question at issue as stated by the court was:

> "Whether lands within the boundaries of the alleged Mexican or Spanish grant, which was then *sub judice* were public lands within the meaning of the act of Congress under which the patent, whereon the appellee's title rests, was issued to the railroad company."

The court held that the claim under the railroad company could not be sustained.

In the case of Scott *et al. vs.* Carew *et al.* (196 U. S., 100) there was involved the claims of the heirs of "an individual

settler" craving priority of right to purchase as a pre-emptor certain lands of the United States of which the settler had been dispossessed before any statute had been passed under which he might acquire title to it, and the land was held to have been in a state of reservation and in the actual occupation of the troops of the United States when the statute was passed, in 1826, and so remained until abandoned, in 1883. This court held that the statute awarding the right of pre-emption purchase to settlers of the United States under such circumstances will not be construed as applicable to land in actual reservation and use by the United States in the absence of specific language in the statute indicating the purpose by Congress so to do; "but, while so appropriated, they are *excepted from the operation of the public-land laws*, and *no right of an individual settler attaches* to or hangs over the land to interfere with such action as the Government may thereafter see fit to take in respect to it."

It is submitted that, according to the decisions of this court cited above, statutes in favor of a State for schools or internal improvement, such as the reclamation of otherwise worthless swamp lands, a different principle applies and a different construction is given, based upon the manifest intent of Congress to grant the character of lands defined by the grant which are not expressly excepted therefrom.

Certain it is that, in purpose and scope, the swamp-land grant was of the broadest and most comprehensive character, and was not confined to lands which were ready for disposition as mere "public lands of the United States." There was also a consideration for the grant, and it is not believed that Congress intended that the State should undertake the burdens involved in reclaiming these worthless swamp lands upon the faith of utilizing the consideration derived from the sale thereof and then be deprived of their possession and use when the reservation is formally abandoned.

There is nothing in the contention that the act of February 24, 1871 (16 Stats., 430), constitutes a legislative construction contrary to the claims of the State. There were undoubtedly some non-swamp lands in the Fort Sabine Reservation which did not come within the definition of the character of lands passing under the grant. Such lands, of course, could be sold under the provisions of that act.

As to the lands involved in this suit, they have been found by the Interior Department to have fallen within the terms of the grant.

In opposition to the contention that they must be sold under the act of 1871, Secretary Smith properly said:

> "The act of 1871 aforesaid cannot be construed as intending to make any disposition of said swamp and overflowed lands inconsistent with the title previously granted to the State of Louisiana as aforesaid (Wilcox *v.* McConnell, 13 Peters, 513; Leavenworth R. R. Co. *v.* United States, 92 U. S., 741; Hastings and Dakota R. R. Co. *v.* Whitney, 132 U. S., 357-360)."

It thus appears that the decision and action of Mr. Secretary Smith in 1895, holding that the reservation by executive order did not inhibit the operation of the swamp-land grant of March 2, 1849, comport with a long line of decisions of the Interior Department and of this court, which had theretofore received legislative recognition and sanction by the act of Congress of March 2, 1889 (25 Stats., 877).

That the decisions of this court, especially of recent years, tend toward a construction of grants in favor of private individuals and corporations so as to limit the same to public lands of the United States subject to entry at the date of the grant, is not denied. In the discussion of grants, either *limited in their provisions* or by this principle, this court has gone to the extent of referring to certain State decisions, which have carried the doctrine even further, as is sug-

gested on page 8 of the brief of counsel for the defendants; but, so far as counsel is advised, this court has not overruled the cases construing the school-land grants cited above.

Neither has this court been called on to consider the legislative construction of the swamp-land grants to Louisiana involved in the act of March 2, 1889 (25 Stats., 877).

The general swamp-land grant of 1850 has been repeatedly construed by the court in the liberal spirit in which it was passed; and it is not believed that any decision of this court conflicts with the theory of the effect of the swamp-land grants, as administered by the Land Department for a half of a century, namely, that by purpose and scope they were so broad as to embrace swamp lands in a state of reservation.

Conclusion.

In conclusion, it is deemed proper to say that, in the opinion of counsel for the plaintiff, an original suit of such far-reaching importance as this should not be disposed of on the motion to dismiss for want of jurisdiction without an opportunity being given for an oral argument of the questions involved. It is maintained that the court has jurisdiction, and that the case should be considered on its merits.

GEORGE H. LAMAR,
Of Counsel for Plaintiff

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE STATE OF LOUISIANA, COMPLAINANT,
v.
JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, and Fred Dennett, Commissioner of the General Land Office, defendants.

No. 7, Original.

BRIEF FOR DEFENDANTS ON DEMURRER TO BILL OF COMPLAINT.

STATEMENT.

This suit is brought in behalf of the State of Louisiana, by its attorney-general, for the purpose of enjoining the defendants, officers of the United States, from proceeding, under the public-land laws, to dispose of certain lands in that State the title to which, it is alleged, has become vested in the State by virtue of a grant of swamp lands and the action taken in the General Land Office in that connection.

An act of Congress, approved March 2, 1849 (9 Stat., 352), entitled "An act to aid the State of

Louisiana in draining the swamp lands therein," reads as follows:

> That to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, which may be or are found unfit for cultivation, shall be, and the same are hereby, granted to that State.
>
> SEC. 2. *And be it further enacted*, That as soon as the Secretary of the Treasury shall be advised, by the governor of Louisiana, that that State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the surveyor-general thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation, and a list of same to be made out, and certified by the deputies and surveyor-general, to the Secretary of the Treasury, who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands shall be applied exclusively, as far as necessary, to the construction of the levees and drains aforesaid.
>
> SEC. 3. *And be it further enacted*, That in making out a list of these swamp lands, subject to overflow and unfit for cultivation, all legal subdivisions, the greater part of which is

of that character, shall be included in said list; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom: *Provided, however,* That the provisions of this act shall not apply to any lands fronting on rivers, creeks, bayous, water courses, etc., which have been surveyed into lots or tracts under the acts of third March, eighteen hundred and eleven, and twenty-fourth May, eighteen hundred and twenty-four: *And provided, further,* That the United States shall in no manner be held liable for any expense incurred in selecting these lands and making out the lists thereof, or for making any surveys that may be required to carry out the provisions of this act.

The act of September 28, 1850 (9 Stat., 519), entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," contains the following provisions:

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

SEC. 2. *And be it further enacted,* That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor

of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however,* That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

SEC. 3. *And be it further enacted,* That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

SEC. 4. *And be it further enacted,* That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

The bill alleges that in 1893 the Commissioner of the General Land Office rejected the claim of the State, for the reason that, at the date of the grant, the lands in question were within the limits of the Fort Sabine Military Reservation, which, under the provisions of an act of February 24, 1871 (16 Stat., 430), was subsequently abandoned, and that in 1895 the Secretary of the Interior reversed this decision and

indorsed his approval upon the list in question, as follows:

> The foregoing list No. 51 of swamp lands selected in the New Orleans land district, Louisiana, embracing an area of six thousand four hundred and ninety-seven and forty one-hundredths of an acre (6,497.40), is hereby approved to the State of Louisiana *under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850*, subject to any valid adverse rights that may subsist to any of the tracts therein described.

The bill continues by alleging that thereupon the title vested in the State of Louisiana in fee simple; but that, upon the request of the Commissioner of the General Land Office for instructions whether, "in view of a number of departmental decisions rendered since" the case was first considered, the lands "should be patented and certified to the State," the then Secretary of the Interior, on June 6, 1904, recalled and vacated this approval by his predecessor, and directed that the lands be held for disposition as provided by law (33 Land Dec., 13); and avers that the action of the Secretary in vacating this order was null and void.

A determination of the jurisdictional questions raised on behalf of defendants in a motion to dismiss was postponed, without prejudice, to a hearing of the case upon the merits. A demurrer on behalf of the defendants has now been interposed, and, in support

thereof, the following reasons are respectfully presented:

ARGUMENT.

I.

The United States, the real party in interest as defendant, has not consented to be sued, and can not be sued without its consent.

In the case of *Minnesota* v. *Hitchcock* (185 U. S., 373), as in this, a State was plaintiff in a suit against the Secretary of the Interior and the Commissioner of the General Land Office to restrain them from selling school sections in an Indian reservation, and the court said (p. 387):

> Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party

> on the record, but by the question of the effect of the judgment or decree which can be entered.

It was held, however, that a certain act of Congress was a sufficient consent on the part of the United States to be sued in respect to school lands within an Indian reservation, but in the case of *Oregon* v. *Hitchcock* (202 U. S., 60), a suit by a State against the same officers to restrain them from allotting and patenting in severalty swamp lands within an Indian reservation, there was no act of Congress which could be so construed. The court, therefore, held that it was without jurisdiction. In *Naganab* v. *Hitchcock* (202 U. S., 473) this decision was affirmed.

In the case of *Kansas* v. *United States* (204 U. S., 331) a bill was filed on behalf of that State for the purpose of recovering the title to lands alleged to have been granted to the State for the benefit of a railroad company, but this court, the Chief Justice delivering the opinion, said (p. 342):

> It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

The bill was therefore dismissed upon the ground that the court did not have jurisdiction of the controversy.

The decisions above mentioned clearly determine the present suit in favor of the defendants. From the effect of the decree sought it appears that the

United States, and not the defendants, is the real party in interest, and, as the United States has not consented to be sued, it results that, for these reasons alone, the bill must be dismissed.

II.

The swamp-land grant did not cover lands within this military reservation.

Even if the court had jurisdiction, this suit must fail, for the reason that these military reservation lands were not intended to be and were not covered by the swamp-land grant.

It will be remembered that these swamp-land grants, like other grants from the United States to States or corporations to aid in the construction of public works, are to be interpreted most strongly against the grantee and in favor of the Government, and that nothing passes but what is clearly and explicitly included within the terms of the grant. (*Rice* v. *Railroad Company*, 1 Black, 358, 380; *United States* v. *Michigan*, 190 U. S., 379, 401.)

In *Wilcox* v. *Jackson* (13 Pet., 498) the sale of certain lands under authority of an act of Congress had been ordered, without excepting therefrom a military reservation included within the boundaries thereof, and, after holding that the act did not apply to the reservation lands, the court added (p. 513):

> We go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment,

> the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it.

In the case of *Leavenworth, Lawrence, etc., Railroad* v. *United States* (92 U. S., 733), Congress had enacted "That there be, and is hereby, granted" to a State, to aid in the construction of a railroad, "every alternate section of *land*, designated by odd numbers," within certain limits, with a proviso, "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act." It was contended that an Indian reservation was not excepted from the grant because the lands were not "reserved to the United States," but the court said (pp. 741, 747):

> If the exception and the proviso were omitted, the language used in the body of this act can not be construed to include the Osage lands. * * * Such grants could not be otherwise construed, for Congress can not be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary, because the policy which dictated them confined them to lands which Congress

> could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. * * * Every tract set apart for special uses is reserved to the Government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes.

Referring to the case of *Wilcox* v. *Jackson* (*supra*), the court continued (p. 745):

> It may be urged that it was not necessary in deciding that case to pass upon the question; but, however this may be, the principle asserted is sound and reasonable, and we accept it as a rule of construction. The Supreme Courts of Wisconsin and Texas have adopted it in cases where the point was necessarily involved. (*State* v. *Delesdenier*, 7 Tex., 76; *Spaulding* v. *Martin*, 11 Wis., 262.)

In the latter case the Supreme Court of Wisconsin said (p. 274):

> When the Government, therefore, obviously in pursuance of its general policy in respect to its public lands held for sale, makes a grant to the State of large quantities, reaching through an extensive tract of country, where it has large bodies of those lands, it is impossible to believe they intended to grant those tracts which had been set apart for public use. On the contrary, such a grant can be reasonably construed as referring only to those lands within the policy which induced it. And it must be assumed that these reservations were not specifically excepted in the grant for the reason that they were so obviously outside of

> its scope and intent, that such exception was not supposed to be necessary. And this view is sustained by the only authorities that have ever passed upon the question.

In *Newhall* v. *Sanger* (92 U. S., 761) the court, referring to the matter of land grants as considered in the Leavenworth case, *supra*, said:

> We held that they did not embrace tracts reserved by competent authority for any purpose or in any manner, although no exception of them was made in the grants themselves.

These decisions have been frequently affirmed. (*Northern Pacific Railroad* v. *Musser-Sauntry Company*, 168 U. S., 604, 609; *Scott* v. *Carew*, 196 U. S., 100; *Northern Lumber Company* v. *O'Brien*, 204 U. S., 190.)

It is difficult to imagine any reason which could be advanced in support of a contention that a grant of all lands which are swamp within a State is different in principle from a grant of all lands within described boundaries, so far as exceptions therefrom are concerned. If a grant of lands described as all those within certain boundaries does not apply to the tracts within those boundaries which are reserved, it must necessarily follow that a grant of lands described as "the whole of those swamp and overflowed lands" does not cover such of those lands as are reserved.

In the decision above mentioned it is true that grants in aid of the construction of railroads were under consideration, but the swamp-land grant is

similar to the railroad grants and there is no distinction in principle between them upon this point. The court, in *Wright* v. *Roseberry* (121 U. S., 488, 499) said:

> The grants by the United States of land to aid in the construction of railroads, in relation to which we have had many cases before us, are in many particulars analogous to the grant by the swamp-land act. They are usually of a specified number of sections of land on each side of the proposed route of the road, with a reservation of certain sales or of other disposition made before such road becomes definitely fixed. The usual words of grant in such cases are similar to those in the swamp-land act—"there is hereby granted." Though it is impossible to locate the land granted until the route is fixed, yet when that is fixed the grant takes effect as of the date of the act. This would be equally the case were the mode prescribed to fix the boundaries more complicated and difficult.

Like the railroad grants, the swamp-land grant takes effect *in praesenti*, the title to lands covered by the grant passing as of the date of the act. (*Wright* v. *Roseberry, supra; Michigan Land and Lumber Company* v. *Rust*, 168 U. S., 589.) The words used in both railroad and swamp-land grants—"shall be and are hereby granted"—create an immediate interest and do not indicate a purpose to give in the future. (*Wright* v. *Roseberry, supra*, p. 496.) "This court has held that they have no other meaning;

and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant." (*Leavenworth, etc., R. R. Co.* v. *United States, supra*, p. 741.) Congress obviously could not have intended to grant to the State any interest as of the date of this swamp-land act in lands then reserved and occupied for military purposes, and, the act by which such a grant is made being a law as well as a conveyance, effect must be given to the intent of Congress. (*Missouri, etc., Railway Company* v. *Kansas Pacific Railway Company*, 97 U. S., 491, 497.)

Being thus reserved and excepted from such a grant at the date thereof, it is immaterial whether they subsequently become public lands. (*Newhall* v. *Sanger*, 92 U. S., 761; *United States* v. *Southern Pacific*, 146 U. S., 570.)

In the latter case the court said (p. 606):

> The intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grants shall operate at a fixed time, and shall take only such lands as at that time are public lands, and therefore grantable by Congress; and is never to be taken as a floating authority to appropriate all lands within the specified limits which at any subsequent time may become public lands.

Congress evidently understood that the grant now under consideration did not apply to the reservation lands, since, by the act of February 24, 1871 (16 Stats., 430), it "authorized and empowered the Secretary of

War to transfer to the custody and control of the Secretary of the Interior, for disposition for cash according to the existing laws of the United States relating to the public lands, after appraisement, to the highest bidder, and at not less than the appraised value, nor at less than one dollar and twenty-five cents per acre, the United States military reservation at Fort Sabine, in the State of Louisiana."

Furthermore, it appears (Ex. "A," attached to the bill of complaint) that a portion of the military reservation since 1850 has been set apart and used under the direction of Congress, and is still maintained, for light-house purposes. If the swamp land grant attaches immediately upon the discontinuance of the military reservation, then it is superior to the light-house reservation. Clearly, that was not the intention of Congress, and certainly such a contention could not be maintained.

These lands, therefore, were not intended to be, and were not in fact, granted to the State as swamp land, and, consequently, the title thereto could not have passed to the State by any action which might have been taken, in the Interior Department or elsewhere.

III.

The legal title to the land in question remains in the United States.

Whether these lands are covered by the swamp-land grant or not, the legal title remains in the United States; and it is well settled that, under such circum-

stances, the Court will not interfere with the Land Department in the determination of questions concerning the public lands.

The complainant alleges that the Secretary of the Interior, in 1895, approved a list covering the tracts in question, and that, under the act of 1849, on that approval the fee-simple title to the lands vested in the State of Louisiana.

The act of 1850, however, to the provisions of which the complainant does not invite attention, provides that the Secretary of the Interior shall "*cause a patent to be issued* to the State therefor, and *on that patent* the fee simple to said lands shall vest in the said State."

No such patent has been issued, and under this later act, the legal title passes only upon delivery of the patent. In *Brown* v. *Hitchcock* (173 U. S., 473), as in the present case, it was contended that the action of the Secretary of the Interior, in revoking an approval by his predecessor of a selection of lands under this act of 1850, was void, but Mr. Justice Brewer, delivering the opinion, said (p. 476):

> Under the swamp-land act the legal title passes only on delivery of the patent. So the statute in terms declares * * *. In this case the record discloses no patent and therefore no passing of the legal title * * *. Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the land department.

This act of 1850 applies to Louisiana and repeals the act of 1849, at least in so far as its provisions are inconsistent therewith.

"It is always to be borne in mind, in construing a Congressional grant, that the act by which it is made is *a law as well as a conveyance*, and that such effect must be given to it as will carry out the intent of Congress." (*Missouri, etc., Railway Company* v. *Kansas Pacific Railway Company*, 97 U. S., 491, 497.)

There is a general rule, too well settled now to be questioned, that when there are two acts of Congress on the same subject, the later act embracing the provisions of the former and also new provisions, the later act, without any repealing clause, operates as a repeal of the former. (*Morris* v. *Crocker*, 13 How., 429; *United States* v. *Tynen*, 11 Wall., 88; *Murdock* v. *City of Memphis*, 20 Wall., 590.)

In the case of *Murdock* v. *City of Memphis*, *supra*, it was held that an act of 1867, although without express words of repeal or repealing clause, repealed by implication the twenty-fifth section of the Judiciary Act of 1789, relating to the appellate jurisdiction of this court.

The court said:

> The differences between the two sections are of two classes, namely, the change or substitution of a few words or phrases in the latter for those used in the former, with very slight, if any, change of meaning, and the omission in the latter of two important provisions found in the former. * * *

> A careful comparison of these two sections can leave no doubt that it was the intention of Congress, by the latter statute, to revise the entire matter to which they both had reference, to make such changes in the law as it stood as they thought best, and to substitute their will in that regard entirely for the old law upon the subject. We are of opinion that it was their intention to make a new law so far as the present law differed from the former, and that the new law embracing all that was intended to be preserved of the old, omitting what was not so intended, became complete in itself and repealed all other law on the subject embraced within it. The authorities on this subject are clear and uniform.
>
> The result of this reasoning is that the twenty-fifth section of the act of 1789 is technically repealed, and that the second section of the act of 1867 is, of course, the law now and has been ever since it was first made so. What is changed or modified is the law as thus changed or modified. That which is omitted ceased to have any effect from the day that the substituted statute was approved.

A like intention is apparent in the act of 1850. Its provisions (section 4) are expressly extended to and its benefits conferred upon "each of the other States of the Union in which such swamp and overflowed lands known as designated as aforesaid may be situated." No exception is made and clearly none was intended. It is decisive evidence of an intention to prescribe the provisions contained in the later act as

the only ones upon that subject which should be obligatory.

This is not a case for the application of the rule that a posterior general act does not repeal a prior special provision, unless the legislative intent to repeal be apparent, because it does not fall within the reason of the rule.

This point is illustrated by the case of *The People* v. *Jachne* (103 N. Y., 182). It appeared that, first, there was a *special* provision in the charter of the city of New York, making bribery by a city officer a crime, and next, a *general* law, later in date, containing provisions defining the crime of bribery by "every person executing the functions of a public office." A judgment of conviction against a member of the common council of that city, under the general law, was sustained.

The rule under consideration was held inapplicable, the court saying (p. 194):

> It will be found, I think, on examining the cases in which the courts have held that a special law was not repealed by a subsequent general law on the same subject, that they are as a general rule cases where the legislature was not dealing directly with the subject of the prior law, and it was not in the mind of the legislature when the general law was enacted, or where the special law was a part of a system of local administration, or where it was possible to assign a reasonable motive for retaining the special and peculiar provisions of the special act, notwithstanding the enactment

of a subsequent general rule covering the same subject.

Congress in the act of 1850 was dealing directly with the subject of grants of swamp lands to States for internal improvements, and that was the subject of the act of 1849. The definitions of swamp lands in the two acts are substantially the same. The consideration for the two grants was the same. There is no reason for making any exceptions in the case of Louisiana. A reasonable interpretation should be adopted, and it is not reasonable to say that Congress intended to establish one rule in Louisiana and another elsewhere.

Furthermore, the rule under consideration applies "unless there is something in the general law * * * that makes it manifest that the legislature contemplated and intended a repeal." (Sutherland on Stat. Const., 2d. ed., sec. 274.) As we have seen, the intent to extend the provisions of the later law to all the States is expressly declared, and the ultimate object of all rules of statutory construction is the discovery of the sensible design of the legislature.

Moreover, this is not a case of a subsequent general law. The later law is as specific as the former. Being made applicable expressly to "each of the States," it is no less special, but is more comprehensive, than the act of 1849.

But it is not necessary to determine that the act of 1849 is entirely repealed. It is sufficient that the inconsistent provision of the act of 1850 as to the vesting of the title shall be held to prevail.

In *Barney* v. *Dolph* (97 U. S., 652) it appeared that the original act granting land to settlers in Oregon, known as the Donation Act, had provided that in cases where married persons had complied with its provisions and one died before patent issued the survivor and children or heirs of the deceased should be entitled to his or her share, unless it should be disposed of by will, and that all contracts for the sale of the land before patent should be void. A later act repealing the prohibition of sales was held inconsistent with the provisions as to descent to heirs in case of death before patent, the court saying (pp. 656, 658):

> If there is a positive and irreconcilable repugnancy between the old law and the new the new must stand and the old fall, even though the result is reached by implication alone. * * * The two can not stand together, and consequently the power of sale, which was the latest enactment, must prevail.

The same principle applies in the present case. The provision that legal title shall pass when a patent issues is clearly inconsistent with one that such title passes upon the approval of a list of the lands, and, being later, repeals the former.

The State of Louisiana has several times treated the act of 1850 as applicable to lands within its borders.

For instance, the State instituted proceedings in the Court of Claims (*United States* v. *Louisiana*, 123 U. S., 32; 127 U. S., 182) to recover money alleged to be

due under an act of March 2, 1855 (10 Stat., 634), which provided for the patenting of lands to persons who, prior to the issuance of patents to the States under the act of 1850, had located upon swamp lands, and for the payment to the States of the purchase money as indemnity therefor.

As this act of 1855 referred only to the granting act of 1850, making no mention of that of 1849, it seems reasonable to say that Congress understood the act of 1849 to have been superseded by that of 1850, and the State must have contended that the act of 1850 applied to lands in Louisiana.

Again, the register of the State land office, proceeding apparently under authority of an act of the State legislature (act 43, Sess. Laws, 1892), "protested to the Secretary of the Interior against the patenting of the lands embraced in the approved list, because the selection and listing did not describe the lands in accordance with the latest approved survey thereof" (33 Land Dec., 15), thus indicating that patents were thought necessary, and that it was understood title would not pass until they were issued.

Furthermore, the Secretary of the Interior, in his decision of June 6, 1904, in this case (33 Land Dec., 16), of which this court may take judicial notice (*Knight* v. *Land Association*, 142 U. S., 161, 169; *Caha* v. *United States*, 152 U. S., 211, 221; *Southern Pacific* v. *Groeck*, 68 Fed., 609, 612), says:

> The list submitted to the Secretary of the Interior, list 51, was made up in the General Land Office from the State's original selection

> list No. 4, it is true, but was submitted for approval as a selection under both the acts of 1849 and 1850, and was approved, as has been seen, "under the act of March 2, 1849, as supplemented and enlarged by the act of September 28, 1850." So that it was really an approval under the act of 1850, and was not intended as the final action of the Land Department. The nature of the approval is not open to question. It was clearly not intended as passing title under the act of 1849, and was not so treated by the State, for, as before shown, the State sought to correct the description before the patent of the United States was to be issued upon said approval.

This is in accordance with previous rulings of the Interior Department. In an opinion by Attorney-General Garland (18 Opins., 522), adopted by the Secretary of the Interior (5 Land Dec., 464), it was declared that—

> This last act was substantially a reenactment of the act of the 2nd of March, 1849, so far as Louisiana was concerned.

The Revised Statutes, sections 2479 and 2480, covering the swamp-land grants, provide that the Secretary of the Interior "shall cause patents to be issued to said State therefor, conveying to said State the fee simple of said land." There is no provision excepting Louisiana from this general rule, and special swamp-land provisions applicable to other States are included in the revision. (Secs. 2479, 2485, *et seq.*)

But, in any event, complainant has not established its case. It claims an approval under the act of 1849, which, it says, passed the legal title. Instead of showing any such approval, it refers only to an order which expressly declares that it is an approval "under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850." Its own evidence does not support its claim. Whatever might have been the force and effect of an approval under the former act need not concern us. There is no such approval.

By an examination of the opinion rendered by the Secretary at the time this order was made (Ex. "A," attached to the bill), it clearly appears that the act of 1850 was considered as an amendment of that of 1849.

There is another reason for concluding that the legal title has not passed. By an act of August 3, 1854 (R. S., sec. 2449), Congress provided:

> That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, * * * shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby.

In the case now before us there was no such certificate, and, referring to this act, the Secretary of the Interior well said (33 Land Dec., 17):

> This legislation was in clear recognition of the prevailing methods of the land department in administering grants of the character specified. A suggestion that inasmuch as the grant of 1849 is *in presenti*, and inasmuch as the act making that grant provided that the fee-simple title should vest in the State upon the *approval* of its lists of selections by the Secretary of the Interior, therefore the Congress was without authority to change its terms, is without force. The act of 1849 provided for the selection of the lands granted by the Secretary of the Treasury (Interior), and his approval was to pass the fee-simple title. Until such approval there was in fact no selection, and the title remained in the United States. It was clearly, therefore, within the power of Congress to provide a different means of administering the grant as to land not already approved. The act of 1854 furnished a rule of administration, if, indeed, Congressional legislation recognizing a uniform practice in this particular was necessary, and does not add to or take from the act of 1849 any material provision. It is not perceived that any right of the State, either legal or equitable, is invaded thereby.

The authority of the Secretary, under such circumstances, to revoke the order of his predecessor, can not be questioned. Like action was upheld in the case of *Brown* v. *Hitchcock* (*supra*). Moreover, as already shown, the lands in this case were clearly

excepted from the grant, and therefore, inasmuch as public officers can not bind the Government beyond the scope of their lawful authority (*Leavenworth, etc., Railroad Company* v. *United States, supra*, p. 739), it was not only the privilege, but the duty of the Secretary to revoke and annul the unauthorized and unlawful approval.

IV.

That the court will not interfere with the Land Department of the Government in the determination of questions concerning the public lands, so long as the legal title remains in the United States, is too well settled to require comment. (*Kirwan* v. *Murphy*, 189 U. S., 35; *Bockfinger* v. *Foster*, 190 U. S., 116; *Humbird* v. *Avery*, 195 U. S., 480; *Oregon* v. *Hitchcock*, *supra*.)

V.

It should be observed that the act of February 24, 1871 (*supra*), discontinuing the military reservation, expressly directed the Secretary of the Interior to dispose of the lands "for cash according to the existing laws of the United States relating to public lands." Thus there does not seem to have been left with the Secretary any authority to inquire whether these reservation lands were, or were not, subject to the swamp-land or any other grant, and to enjoin him from proceeding, as plaintiff alleges he threatens to proceed, would be to enjoin the enforcement of an act of Congress. It is therefore suggested that the principle that a public officer will not be restrained in the performance of his public trusts, even though the

rights of a State may be violated by acts of Congress, should be applied, and that this case is governed by the decisions in *Cherokee Nation* v. *Georgia* (5 Pet., 1); *Mississippi* v. *Johnson* (4 Wall., 475); *Georgia* v. *Stanton* (6 Wall., 50), and *Grant* v. *Cooke* (7 D. C., 165, 201).

It will of course be remembered that in the *Cherokee Nation* case the injunction was denied upon the ground that the Indians were not a foreign nation within the meaning of the Judiciary Act, and therefore had no standing in court, but Chief Justice Marshall, who delivered the opinion, as this court said in *Georgia* v. *Stanton* (p. 74), "very strongly intimated that the bill was untenable on another ground, namely, that it involved simply a political question." He said (p. 20):

> That part of the bill which respects the land occupied by the Indians and prays the aid of the court to protect their possession may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the political power to be within the proper province of the judicial department.

Such is the present case. To enjoin the Secretary from disposing of the lands as directed by the act of

1871 would be to restrain the action of Congress, and would be an unwarranted interference with the political power. This is not an instance in which the performance of a purely ministerial act directed by Congress may be required, as in *Marbury* v. *Madison*. On the contrary, the complainant asks that the command of Congress be disregarded and that action in accordance therewith be prevented by injunction. Further comment seems unnecessary.

VI.

If, as complainant contends, the legal title has become vested in the State, then the proper remedy is an action at law. (*Lewis* v. *Cocks*, 23 Wall., 466; Rev. Stats., sec. 723.) A bill in equity is not the proper means to recover possession of land. Much less would the extraordinary process of proceeding by injunction be upheld for that purpose. An action of ejectment is an adequate and the only proper remedy. (*Lewis* v. *Cocks*, supra; *United States* v. *Lee*, 106 U. S., 196; *Johnson* v. *Munday*, 104 Fed., 594.)

We therefore respectfully submit that the bill should be dismissed.

CHARLES J. BONAPARTE,
Attorney-General.

HENRY M. HOYT,
Solicitor-General.

GLENN E. HUSTED,
Assistant Attorney.

O

FILED
OCT 12 1908
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 7, Original.

THE STATE OF LOUISIANA, COMPLAINANT,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, AND FRED. DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS.

BRIEF FOR COMPLAINANT ON DEMURRER.

GEORGE H. LAMAR,
HARVEY M. FRIEND,
Of Counsel for Complainant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 7, Original.

THE STATE OF LOUISIANA, COMPLAINANT,

vs.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, AND FRED DENNETT, COMMISSIONER OF THE GENERAL LAND OFFICE, DEFENDANTS.

BRIEF FOR COMPLAINANT ON DEMURRER.

Statement.

The case is presented upon the demurrer of the defendants to the bill of complaint. In essence, the defendants claim that the title to the property remains in the United States, and, upon this hypothesis, the contention is made that the United States is the real party in interest, and that the bill should be dismissed because the United States cannot be sued without its consent.

As the theory of the defendants is diametrically opposed to the theory of the complaint, it is deemed proper to briefly state the salient averments of the bill.

The bill was filed, with leave of court, under section 2 of Article III of the Constitution of the United States, on May 27, 1907. Process was then waived in open court by counsel for the defendants.

The bill avers that the plaintiff is one of the sovereign States of the United States; that defendant Garfield is a citizen of the State of Ohio and Secretary of the Interior Department of the United States; that the defendant Ballinger is a citizen of the State of Washington and Commissioner of the General Land Office of the United States; that Congress passed an act, approved March 2, 1849 (9 Stats., 352), entitled "An act to aid the State of Louisiana in draining the swamp lands therein," the provisions of which act are set out in paragraph 3; that at the time of the passage of said act the lands involved, aggregating 6,497.40 acres, "were swamp and overflowed lands, unfit for cultivation"; that on March 2, 1849, none of said lands were held or claimed by individuals, nor were any of them lands fronting on rivers, creeks, etc., which had been surveyed into lots or tracts under the act of March 3, 1811, and of May 24, 1824; that on December 7, 1850, *under and pursuant to said act of March 2, 1849*, the Surveyor-General of the United States for Louisiana, certified said lands, with others, to the Commissioner of the General Land Office as inuring to the complainant under said grant, and reported that they were "subject to a military reservation," meaning the Fort Sabine Military Reservation, which had been established December 20, 1838; that action on said list by the Land Department was suspended in May, 1852, "for further examination and adjudication"; that by executive order of March 25, 1871, issued under the act of Congress approved February 24, 1871 (16 Stats., 430), said reservation was formally abandoned; that on September 13, 1893, the General Land Office, having taken up said swamp land selection for "further examination and adjudication," held the claim of the plaintiff for rejection on the ground that, being within the military reservation, the land did not pass to the plaintiff, either by said grant of March 2, 1849, or by that of September 28, 1850 (known as the general swamp land grant to the several States); that the plaintiff,

having appealed from said decision of September 13, 1893, the Secretary of the Interior, under date of October 31, 1895 (21 Land Decisions, 357), reversed said decision below and held that the reservation did not inhibit the operation of the grant, and that the act of 1871 "cannot be construed as intending to make any disposition of said swamp and overflowed lands inconsistent with the title previously granted to the State of Louisiana," citing Wilcox *vs.* McConnell, 13 Peters, 513; Leavenworth R. R. Co. *vs.* U. S., 92 U. S., 741; Hastings and Dakota R. R. Co. *vs.* Whitney, 132 U. S., 357-360; and in said decision the Commissioner of the General Land Office was directed that the lands "will be certified to the State of Louisiana under the swamp land grants"; that, "in execution of and pursuant to the said decision and direction," the Commissioner of the General Land Office, on December 5, 1895, submitted "Clear List No. 51, duly prepared and certified in accordance with the rules and resolutions," embracing said lands, "and recommended that" the same "be approved"; which list No. 51 was thereafter, to wit, December 10, 1895, approved by the Secretary of the Interior in the following language, to wit:

> "DEPARTMENT OF THE INTERIOR,
> "OFFICE OF THE SECRETARY,
> "WASHINGTON, D. C., *Dec'r 10, 1895.*
>
> "The foregoing list, No. 51, of swamp lands selected in the New Orleans land district, Louisiana, embracing an area of six thousand four hundred and ninety-seven and forty one-hundredths of an acre (6,497.40), is hereby approved to the State of Louisiana under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850, subject to any valid adverse rights that may subsist to any of the tracts therein described.
>
> "(Signed) HOKE SMITH,
> *"Secretary."*

The bill further avers "that *immediately upon* and *by the approval* of said list No. 51 by the said Secretary of the Interior on the 10th day of December, 1895, the *title to* each and all of the lands *vested eo instanti in the State of Louisiana in fee simple*, in pursuance of the provisions of section 2 of the said act of March 2, 1849" (9 Stats., 352); that, notwithstanding this vestiture of title in the plaintiff and the loss of "*jurisdiction over said lands by the Land Department of the United States*," certain proceedings were unlawfully undertaken by the Commissioner of the General Land Office and the Secretary of the Interior looking to the unlawful cancellation of said list and the unlawful assumption of authority to redispose of said land the same as if the title had not passed from the United States, as in the bill is more particularly set forth, culminating in a communication from the defendant Garfield to defendant Ballinger, dated March 20, 1907, in which these two officers of the Land Department, custodians of the records on which the title of the plaintiff is evidenced, undertake in effect to finally vacate and annul the action of the Secretary of the Interior of December 10, 1895, in approving the list and passing the title to the plaintiff, and further to proceed with the unlawful effort to otherwise dispose of said lands, with the consequent result of producing a multiplicity of suits and the mutilation and unlawful endorsements upon said records under which the plaintiff has acquired title.

The only exhibit to the bill consists of the departmental decision of October 31, 1905, under which the swamp-land list in question was thereafter approved, to wit, on December 10, 1895.

The bill prays, among other things, for a "writ of injunction restraining the defendants and each of them from executing said order of the Secretary of the Interior . . . and any and all subsequent orders based thereon or issued pursuant thereto, and from in any way clouding the title or

molesting the plaintiff and its grantees in the enjoyment of the rights, privileges, and title secured by said plaintiff by the approval of said Swamp-land list No. 51 by the Secretary of the Interior on December 10, 1895, under and pursuant to the act of March 2, 1849; and, further, from making or attempting to make any other or further disposition of said lands whatsoever to the detriment of the title of your orator."

The defendants filed a motion to dismiss, together with a brief in support thereof, which was resisted by an extended brief in opposition thereto; and the court postponed action until after hearing of the case on its merits.

Richard A. Ballinger, one of the original defendants, having been succeeded as Commissioner of the General Land Office by Fred Dennett, a citizen of the State of North Dakota, said Fred Dennett was duly substituted for Richard A. Ballinger as party defendant, under the statute.

Thereafter there was filed on behalf of defendants Garfield and Dennett the pending demurrer to the bill of complaint, in which a dismissal of the bill is craved upon seven specifications of demurrer, which are substantially as follows, to wit: (1) That the United States is the real party in interest as defendant, has not consented to be sued and can not be sued without its consent; (2) that the legal title to the land involved remains in the United States; (3) that the swamp-land grant was not intended to and did not cover the land within the Fort Sabine Military Reservation, in which the lands are located; (4) that, upon the theory that the legal title has not passed out of the United States, the action by the defendants is not subject to control, interference or review by this court; (5) that the relief sought by the bill of complaint involves an interference with and restraint upon the political branch of the Government in the execution of the provisions of the act of Congress, approved February 24, 1871 (16 Stats.,

430); (6) that relief should be sought at law and not in equity; and (7) that the bill does not aver facts sufficient to entitle the complainant to any relief.

Argument.

The seventh specification of demurrer is general in character and is not specifically argued in the brief of counsel for defendant, and, therefore, is not deemed worthy of consideration in this brief in response thereto.

The fourth and fifth specifications of demurrer are dependent upon and subsidiary to the first and second specifications of demurrer, and it is believed that the maintenance of the first specification of demurrer is absolutely dependent upon the affirmation of the second specification of demurrer.

In the outset of this argument it is conceded that the jurisdiction of this Court hinges upon the proposition of law, on which the complaint is based, that the title to the land passed out of the United States, and that the Interior Department therefore lost jurisdiction thereof upon the approval of list No. 51 by the Secretary of the Interior, on December 10, 1895. To successfully controvert this proposition, the defendants cannot rely upon their contention that the Secretary of the Interior was wrong in his decision of October 25, 1895 (21 L. D., 357), in holding that the military reservation inhibited the operation of the swamp land grants of March 2, 1849 (9 Stats., 352), and of September 28, 1850 (9 Stats., 519), and in approving the list under the former grant, as complainant contends. The third specification of demurrer, therefore, raises a question which it is not believed to be necessary for the Court to decide in granting the injunctive relief sought in this case. It is believed, however, that the contention on behalf of the defendants in this regard is fully met by the

argument on behalf of the complaint of the proposition that, "the lands involved passed to the plaintiff under the grant of March 2, 1849 (9 Stats., 352)," contained in the brief for complainant in opposition to the motion to dismiss, pages 29 to 45, both inclusive, to which reference is made for a reply to the argument of counsel for defendants in support of their third specification of demurrer.

The defendants must stand or fall upon their contention that, as a matter of law, the title did not pass from the United States upon the approval of the list.

I.

Jurisdiction.

The first specification of demurer reads as follows:

> "That this suit is not one of which this court has jurisdiction, because the issues presented by the bill of complaint do not arise between the State of Louisiana and the said defendants, and do not concern them, or either of them, but arise, if at all, between said State and the United States, which has not consented to be sued, cannot be sued without its consent, and, therefore, has not been and cannot properly be made a party hereto."

The theory of the complaint is, that the defendants, as citizens of certain States of the Union, while occupying the official positions respectively of Secretary of the Interior and Commissioner of the General Land Office, have declared their purpose and are about to perform acts which are in violation of law. Reference to their official positions in the caption of the bill is merely descriptive, and the form of the bill in this regard is conformable to the course pursued in the case of Noble, Secretary of the Interior, *et al. vs.* Union River Logging Railroad Company, 147 U. S., 165, which was a suit against the then Secretary of the In-

terior and the then Commissioner of the General Land Office by the appellee; also in the case of Davis, Governor of the State of Texas, *et al. vs.* Gray, 16. Wall., 203, wherein the suit was brought by the appellee against the Governor of the State of Texas and the then Commissioner of the Land Office for that State. Both of these cases are cited below as applicable to the questions involved in this case.

The question of jurisdiction meets us on the threshold of this investigation. It is contended by the defendants that this court is without jurisdiction to entertain this suit for the reason, as claimed, that it is a suit against the United States, and that the United States has not consented to be sued in this proceeding. In support of their contention on this point, only four cases are cited, viz., Minnesota *vs.* Hitchcock, 185 U. S., 373; Oregon *vs.* Hitchcock, 202 U. S., 60; Naganab *vs.* Hitchcock, Ib., 473; and Kansas *vs.* United States, 204 U. S., 331.

As will be readily perceived from a consideration of these four cases, they have no bearing whatever upon the question of jurisdiction herein, according to the theory of the present bill. In each of the first three cases, just referred to, the Court found expressly that the title to the lands in dispute was in the United States, and that, for *that very reason*, the United States was the real party in interest. That conclusion having been reached, the court necessarily held that the United States could not be sued without its consent. Those conclusions effectively dispose of the cases of Oregon *vs.* Hitchcock, and Naganab *vs.* Hitchcock, because in neither of them had the United States consented to be sued; and hence the bill in each instance was dismissed. In Minnesota *vs.* Hitchcock the court entertained jurisdiction because, although it was held to be a suit against the United States, it was found that, under the act of Congress approved March 2, 1901, the United States had consented to be sued.

In Kansas *vs.* United States, the other case relied upon

by the defendants, it was found that the State of Kansas was not the real party plaintiff, but had permitted the use of her name, as complainant, on behalf of the M. K. & T. Ry. Company, the real party in interest. The bill in that case was therefore dismissed upon two grounds, viz.: First, that this court could not entertain original jurisdiction of a suit against the United States where the real party plaintiff was not a sovereign State of the Union; and, second, that the United States had not consented to be sued.

That is all there is and all that was actually decided in any of the four cases referred to in the defendants' brief, and it requires no further argument to establish that they have not the slightest application or bearing upon the question at issue in this case.

According to the theory of the present bill, and as will be clearly established in a subsequent part of this brief, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain Congressional statute of limitation and repose, the title so conveyed is no longer subject to attack or suit by or on behalf of the Government, and, therefore, the United States is not, and can not be made, the real party defendant, for the all sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever.

If, therefore, the theory of the present bill be correct, and if this court shall find, as we think it must find, that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then it is contended on behalf of the complainant that there cannot be any doubt of the jurisdiction of this court to entertain the suit; and the correctness of this contention will now be demonstrated.

It is believed that the question herein has been virtually and effectually settled in favor of our contention. In the

consideration of the authorities on the subject, it is important to mark the distinction between what are called political powers and such as are purely ministerial. It is well settled that in the exercise of discretionary or political powers, courts will not undertake to control the action of executive officers; but not so with regard to ministerial duties, or where an executive officer is undertaking to act without and beyond the scope of his powers and authority, for no one is above the law, however exalted his position may be. The Secretary of the Interior and the Commissioner of the General Land Office are but creatures of the law, and mere agencies created by the law to carry it into practical operation; and it would be indeed strange if they or either of them should be permitted to exert his agency in violating the law and the Constitution, and then claim exemption from the process of the court, whose duty it is to guard against abuses, on the ground that they are executive officers of the Government and can not be restrained from violating the law.

It is said, in effect, by the defendants, that there are no proper and competent parties before the court as defendants in this case. This is a very narrow view of the subject. It is true that the Constitution does not specifically and *in totidem verbis* provide that this court shall have original jurisdiction of a case in which a State is plaintiff and executive officers of the United States who are attempting to exercise authority and power not given them by the law and not warranted by the law are defendants; but it does provide that a State shall have a judicial remedy in this court, under its original jurisdiction, against individuals, citizens of other States, who are beyond the reach of its own power and process, who do it an injury or who undertake to do it an injury in its *property* rights. This is a right given a State by the Constitution, and this is the court of first instance into which the State is to come.

The doctrine is firmly established, by repeated decisions

of this court, that executive officers of a State or of the United States, may be proceeded against by mandamus when they refuse to execute a ministerial duty imposed upon them by law, wherein no political rights are involved and wherein they are not vested with any further discretion in the matter in hand; and it is equally well settled that such officers may be proceeded against by writ of injunction when they are assuming to act under an unconstitutional statute, or are assuming to act without authority of law and in violation of the law, where there is no adequate remedy at law, and where the complainant will suffer irreparable injury thereby, or where an injunction is the only remedy that can be invoked to avoid a multiplicity of suits.

In the great case of Marbury *vs.* Madison (1 Cranch, 137), it was specifically held that a mandamus would issue at the suit of an individual to compel the Secretary of State to deliver a commission which had been issued to the relator and which that officer refused to deliver to him, even though the Secretary of State was acting under the express directions of the President of the United States. The question was elaborately considered by Chief Justice Marshall, who delivered the opinion of the court, and in the course of the opinion (pp. 170-171), it was said:

> "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process.
>
> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be

done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

"But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as, for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department."

There have been very many cases decided by this court involving the same general principle, in all of which the doctrines of Marbury *vs.* Madison have been applied, and the question is no longer open to argument. A review of many of the cases will be found in the opinion in the comparatively recent case of Noble *vs.* Union River Logging Company, 147 U. S., 165, 171, delivered by Mr. Justice Brown, and it was there said:

"The principle of this case (Marbury *vs.* Madison) was applied in Kendall *vs.* Stokes, 12 Pet., 524, and the action of the Circuit Court sustained in a proceeding where it had commanded the Postmaster-General to credit the relator with a certain sum awarded to him by the Solicitor of the Treasury under an act of Congress authorizing the latter to adjust the claim, this being regarded as purely a ministerial duty. In Decatur *vs.* Pauling, 14 Pet.,

597, a mandamus was refused upon the same principle, to compel the Secretary of the Navy to allow to the widow of Commodore Decatur a certain pension and arrearages. Indeed, the reports of this court abound with authorities to the same effect. Kendall *vs.* Stokes, 3 How., 87; Brashear *vs.* Mason, 6 How., 92; Reeside *vs.* Walker, 11 How., 272; Commissioner of Patents *vs.* Whiteley, 5 Wall., 522; United States *vs.* Guthrie, 17 How., 284; United States *vs.* The Commissioner, 5 Wall., 563; Gaines *vs.* Thompson, 7 Wall., 347; The Secretary *vs.* McGarrahan, 9 Wall., 298; United States *vs.* Schurz, 102 U. S., 378; Butterworth *vs.* Hoe, 112 U. S., 50; United States *vs.* Black, 128 U. S., 40. In all these cases the distinction between judicial and ministerial acts is commented upon and enforced."

The majority of the cases in this court in which an executive officer has been enjoined from executing an unconstitutional statute, or where such officer has been proceeded against on the ground that he is acting or assuming to act beyond the scope of his authority in derogation of the rights of complainants guaranteed to them by the law, have been cases against State officials. Osborn *vs.* Bank of United States, 9 Wheat., 738; Davis *vs.* Gray, 16 Wall., 220; Board of Liquidation *vs.* McComb, 92 U. S., 531; Poindexter *vs.* Greenhow, 114 U. S., 270; Allen *vs.* Baltimore & Ohio Railroad Company, Ib., 311 (these last two being known as the *Virginia Coupon Cases*); Pennoyer *vs.* McConnaughy, 140 U. S., 1; Stanley *vs.* Schwalby, 147 U. S., 508; Tindal *vs.* Wesley, 167 U. S., 204; Scott *vs.* Donald, 169 U. S., 58; Scott *vs.* Donald, Ib., 107; Smyth *vs.* Ames, 169 U. S., 466; Prout *vs.* Starr, 188 U. S., 537; Ex parte Young, 209 U. S., 123, and cases cited and referred to in the opinions in those cases.

In practically all of the cases just referred to, the defence interposed was that the suit was one against the State itself in violation of the Eleventh Amendment to the Constitution. But it was pointed out by this court in the opinions

in those cases that such defences were unsound, and that the suits were not against the State, but were against its officers who were assuming to act under an unconstitutional statute or were assuming to act *ultra vires* to the great and irreparable injury and damage of the complainants in their property rights.

It will subserve no useful purpose to review all of the cases referred to on this point, as to do so would unnecessarily prolong this brief; and, moreover, this court is perfectly familiar with them. Particular reference will be made to only a few of them, as illustrating the principles which govern this case.

The leading case is that of Osborn *vs.* Bank of the United States. That was a suit in equity brought in the Circuit Court of the United States for the District of Ohio by the United States Bank against Osborn, auditor of the State of Ohio, and others, to restrain and enjoin the collection of a tax levied under a statute of Ohio which was alleged to be unconstitutional. The Circuit Court issued the writ, and the defendants appealed to this court, which affirmed the decree below. In passing upon the question of the right of the complainant to bring the suit and as to whether there were proper defendants, this court, speaking by Chief Justice Marshall, said:

> "The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a court of chancery.
>
> "In examining this question, it is proper that the court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, auditor of the State of Ohio, to restrain him from executing a law of that State, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the Constitution of the United States. The true inquiry is, whether an injunction can be issued to

restrain a person, who is a State officer, from performing any official act enjoined by statute; and whether a court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnished no authority or protection to the officer who is about to proceed under it" (9 Wheat., 838).

And again:

"If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit.

"This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power, and for whose advantage, it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connection with his principal, that he is responsible for his own acts, to the full extent of the injury, why should not the preventive power of the court also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing?" (Ib., 842-843).

After a further discussion of this question in all its bearings, the Court continued:

> "It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the Constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted" (Ib., 859).

In Poindexter *vs.* Greenhow, *supra*, Mr. Justice Matthews, speaking for the court, and referring to the distinction between a suit against a State in violation of the Eleventh Amendment and a suit against the officers of a State who were acting or assuming to act under an unconstitutional act of its legislature, said (114 U. S., 287):

> "The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his acts and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command by laws. It is necessary, therefore, for such a defendant to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act."

The court then found that the statute under which the defendant was assuming to act was unconstitutional, and referring to the defence set up that the defendant was acting under that law, the court said:

> "He stands, then, stripped of his official character; and, confessing a *personal* violation of the plaintiff's rights for which he must *personally* answer, he is without defence." (Italics supplied.)

Pennoyer *vs.* McConnaughy, *supra*, was a suit in equity against the board of land commissioners of the State of Oregon, composed of the governor, secretary of state and treasurer of state, by a citizen of California to restrain and enjoin them from selling and conveying a large quantity of land to which he asserted a good title under a contract with the State, and in that respect is very much akin to the case under consideration. The defence there was that the suit was one against the State, just as here it is that the suit is against the United States; but this court held that it could go into the record to ascertain who was the real defendant, and, finding that the statute of Oregon under which the board of land commissioners was assuming to act, was unconstitutional in that it took from the complainant his property without due process of law and in violation of his contractual rights, decided that the suit was not against the State, but was one against the defendants in their individual capacity. The opinion in that case was delivered by Mr. Justice Lamar. After referring to a class of cases in which it had been held that the suits were suits against a State and therefore violative of the Eleventh Amendment, he (p. 10) said:

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment an action against the State," citing a long list of authorities.

Among the cases, cited and referred to in the opinion of Mr. Justice Lamar, was that of Board of Liquidation *vs.* McComb, 92 U. S., 531, 540-541, the opinion in which was delivered by Mr. Justice Bradley, and in which it was said:

> "The objections to proceeding against State officers by mandamus or injunction are: First, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; *and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.* In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void," citing numerous cases. (Italics supplied.)

In Tindal *vs.* Wesley, 167 U. S., 204, ~~212~~, Mr. Justice Harlan, speaking for the court, said: 22

> "The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding pos-

> session happens to be an officer of the State and asserts that he is lawfully in possession on its behalf."

And again (p. 222):

> "But the Eleventh Amendment gives no immunity to officers or agents of a State in withholding the property of a citizen without authority of law. And when such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State."

Scott *vs.* Donald, Smyth *vs.* Ames, and Ex parte Young, *supra*, and the cases therein cited, referred to and quoted from, are but different applications of the same general principles announced in preceding cases, and establish beyond controversy the general doctrines which are contended for in this brief. In the case last cited, decided at the last term of the court, Mr. Justice Peckham, delivering the opinion (209 U. S., 156) said:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action."

While the cases just referred to were against State officers and were held to not be cases against the State, the same principles apply in similar cases against officers of the United States who defend upon the ground that they are such officers. They must make good their defence and show that they are proceeding under the law, and not in violation of it. As said by Mr. Justice Harlan, in delivering the opinion in Tindal *vs.* Wesley, 167 U. S., 204, 212: *"But it cannot be doubted that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States."*

See also Marbury *vs.* Madison, *supra*, United States *vs.* Lee, 106 U. S., 196; Noble *vs.* Union River Logging Company, *supra*, and cases there cited.

That an injunction is the proper remedy against an official of the United States, even though he be the Head of a Department, where such officer is undertaking to act *ultra vires*, and beyond the scope of his authority, and is violating or attempting to violate the law, to the injury and damage of the complainant is firmly established by the decision in Noble *vs.* Union River Logging Company, *supra*, in which, after referring to the cases in which mandamus had been issued against the Head of a Department to compel the performance of a duty purely ministerial, the court (147 U. S., 171-172) said:

> "We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the Head of a Department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

The case of United States and Kaufman *vs* Lee, 106 U. S., 196, in many respects, is identical with this case—in all respects, in fact, with the exception that that was an action of ejectment against officers of the United States who had no personal interest in the subject matter of the controversy, but were in possession of the property simply *as* officers of the United States, under directions of their superior officers, whereas, this is a suit in equity for an injunction to prevent certain officials of the United States from despoiling the complainant of its property by mutilating and destroying the records under which it had been evidenced and selling and conveying the same to innocent purchasers. In that case the complainant sought to recover real property wrongfully withheld from him by the United States officers under an illegal tax sale and illegal executive orders. In this case the complainant seeks to prevent the sale of its property by and under the direction of United States officers, under equally illegal executive orders. In that case, the United States officers had no personal interest in the subject of the action. In this case, the officers against whom this suit is brought have no personal interest in the subject of the suit. In that case, the defendants claimed to be acting under the direct authority of the United States, and the defence was that the United States was the real defendant as the owner of the *res*. In this case the defence is that the suit is virtually against the United States, and that the United States is the owner of the *res*. The defence in that case was found by this court to be bad, for the reason that the United States did not own the property for which restitution was asked. In this case, if our contention be sustained, as we feel that it must be, that the title to the lands in dispute has passed out of the United States and become vested in the plaintiff, and the period within which the same might be recovered by suit of the United States has expired according to the provisions of the statute of limitations, then the United States has no interest in the subject matter

of the suit. Hence, for all practical purposes the parallel is complete. This case is on all fours with that of United States and Kaufman *vs.* Lee. The similarity of this case to the Lee case being thus established, and the identity in principle of the questions involved in both cases being shown to exist, the following quotation from the opinion of the court, delivered by Mr. Justice Miller, in the Lee case should govern this court in reaching a conclusion in the present case, dealing, as it does, with all the preceding leading cases on the same subject, viz. (pp. 210-213):

> "The case before us is a suit against Strong and Kaufman as individuals, to recover possession of property. The suggestion was made that it was the property of the United States, and that the court, without inquiring into the truth of the suggestion, should proceed no further; and in this case, as in that, after a judicial inquiry had made it clear that the property belonged to plaintiff and not to the United States, we are still asked to forbid the court below to proceed further, and to reverse and set aside what it has done, and thus refuse to perform the duty of deciding suits properly brought before us by citizens of the United States."

In referring to the distinction between the English and American doctrine as to the suability of government officials, the court (pp. 208-209) said:

> "Under our system the *people*, who are there (in England) called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no

reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

Again (pp. 219-221), the court said:

"What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further, because it appears that certain military officers, acting under the orders of the President, have seized this estate, and converted one part of it into a military fort and another into a cemetery.

"It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defence stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation.

"These provisions for the security of the rights of the citizen stand in the Constitution in the same connection and upon the same ground, as they regard his liberty and his property. It cannot be denied that both were intended to be enforced by the judiciary as one of the departments of the Government established by that Constitution. As we have already said, the writ of *habeas corpus* has been often used to defend the liberty of the citizen, and even his life, against the assertion of unlawful authority

on the part of the executive and the legislative branches of the Government. See Ex parte Milligan, 4 Wall., 2; Kilbourn *vs.* Thompson, 103 U. S., 168.

"No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

"It is the only supreme power in our system of government, and every man who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the Government; and the docket of this court is crowded with controversies of the latter class.

"Shall it be said, in the face of all this, and of the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the courts can not give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the Government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

"It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his rights to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the

judgment of the court, the wrongful possessor can say successfully to the court, 'Stop here, I hold by order of the President,' and the progress of justice must be stayed. That, though the matter of the controversy is one peculiarly appropriate to the judicial function, though the United States is no party to the suit, though one of the three great branches of the government to which by the Constitution this duty has been assigned has declared its judgment after a fair trial, the unsuccessful party can interpose an absolute veto upon that judgment by the production of an order of the Secretary of War, which that officer had no more authority to make than the humblest private citizen."

On the same general question of the claimed immunity of officers of the Government from suit wherein the defence is that they are such officers, the following eloquent and forceful language of Mr. Justice Matthews, in delivering the opinion of this court in Poindexter *vs.* Greenhow, 114 U. S., 270, 290, 291, is particularly applicable:

"In the discussion of such questions, the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the acts of the State, because within the limits of its delegation of power, the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States, and of the laws made in pursuance thereof. So that, while it is true in respect to the government of a State, as was said in Langford *vs.* United

States, 101 U. S., 341, that the maxim, that the king can do no wrong, has no place in our system of government; yet, it is also true, in respect to the State itself that whatever wrong is attempted in its name is imputable to its government, and not to the State, for, as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say "L' Etat c'est moi." Of what avail are written constitutions whose bills of rights for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle-field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon *individual offenders,* who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked; and of communism, which is its twin; the whole progeny of the same evil birth." (Italics supplied.)

of the General Land Office

It results, from a full consideration of the cases cited and quoted, that there cannot be any doubt of the proposition that in a proper case the Secretary of the Interior and the Commissioner may be proceeded against by writ of injunction to restrain and enjoin them from destroying the evidence of title of a complainant in their custody and in disposing of what had been public lands but whose title had theretofore passed beyond their jurisdiction either by the issue of a United States patent or by a legal conveyance, the equivalent of such patent; for it is elementary law in land jurisprudence that, after the passing of title out of the United States, the officials of the Land Department have become *functus officio* in respect of such lands. And it follows therefrom that when the title to public lands has passed out of the United States and into a State and the statute of limitations for recovery has run, as is the case here, the United States cannot longer be considered and held to have any interest therein, and that a suit against the executive officers of the Government, charged with the duty of protecting and caring for the public lands, who are still insisting that they have jurisdiction over such lands and are asserting the right to sell and dispose of them as public lands, is not a suit against the United States, but, on the contrary, is a suit against those officers as individuals; and they can only defend by showing power and authority of law for the proposed action which, as will be shown, they have no power or authority of law to sanction or permit.

It was well said by the present chief justice, in Stanley *vs.* Schwalby (147 U. S., 508, 518):

> "In these cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defence *he must show that his authority was sufficient in law to protect him.*" (Italics supplied.)

The sole question remaining to be considered on this branch of the case is, therefore, Can this court entertain this suit under its original jurisdiction? This question must be answered in the affirmative.

The Constitution, Article III, sec. 2, provides that:

> "The judicial powers shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to controversies . . . between a State and citizens of another State. . . . In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which *a State shall be Party, the Supreme Court shall have original jurisdiction.*" (Italics supplied.)

It is firmly settled by repeated decisions of this court that, under the provision of the Constitution, a State may bring an original suit in this court against a citizen of another State. Thus, in United States *vs.* Texas, 143 U. S., 621, 644, it was said:

> "It must be conceded that a State can bring an original suit in this court against a citizen of another State."

In Wisconsin *vs.* Pelican Insurance Company, 127 U. S., 265, 287, it was said:

> "By the Constitution, therefore, this court has original jurisdiction of suits brought by a State against citizens of another State."

In Minnesota *vs.* Hitchcock, 185 U. S., 373, 388, it was said:

> "Our conclusion, therefore, is that the original jurisdiction vested by the Constitution in this court over controversies in which a State is a party is not affected by the question whether the State is a party plaintiff or party defendant."

In Pennsylvania *vs.* Wheeling Bridge Company, 13 How., 518, 560, it was said:

> "From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court."

And Chief Justice Taney, in his dissent in that case (p. 579) said:

> "Pennsylvania, as a State, has the right to sue in this court."

In Mississippi *vs.* Johnson, 4 Wall., 475, 501, the court said:

> "It is true a State may file an original bill in this court."

In Texas *vs.* White, 7 Wall., 700, 719, the court said:

> "It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States."

In Pennsylvania *vs.* Quicksilver Company, 10 Wall., 553, 556, the court said:

> "A State, therefore, may bring a suit, by virtue of its original jurisdiction, against a citizen of another State, in this court."

See, also, State of Florida *vs.* Anderson, 91 U. S., 667.

Tested by the language of the Constitution and by the decisions just cited, it is difficult to perceive the slightest objection to the jurisdiction of this court in the present case. The case, as made by the bill, is one in which the State of Louisiana has a substantial interest in the lands which are the subject-matter of the suit. According to the bill, and as will be fully shown hereafter in this brief, the lands in

controversy are not the property of the United States, the title to them having passed out of the United States into the State. The defendants named in the bill, although government officials, are, strictly speaking, not sued as such, for the all sufficient reason that, as such officials, they are *functus officio* as regards the subject-matter of the bill, and do not have and cannot lawfully have any official jurisdiction over such subject-matter, and are, therefore, sued as individuals who, under the cover of their official authority, are unlawfully assuming to exercise a jurisdiction over the lands, which they do not have. They, as individuals, without any authority or jurisdiction over the lands in controversy, are citizens of States other than Louisiana. The State of Louisiana is certainly a proper party. Hence, all the requirements of the Constitution in this regard have been met. In respect to their status *as defendants*, the defendants herein occupy the exact status of the defendant in Noble *vs.* Union River Logging Company, *supra;* and their status, as defendants, cannot be distinguished in principle from the status of the defendants in United States and Kaufman *vs.* Lee; Davis *vs.* Gray; Marbury *vs.* Madison; Pennoyer *vs.* McConnaughy; The Virginia Coupon Cases; Osborn *vs.* Bank of the United States; Smyth *vs.* Ames; Scott *vs.* Donald, and a host of other similar cases cited and referred to in the decisions of those cases. In none of those cases to which reference is made did the defendants, who were either State officials or officials of the United States, have any personal interest in the suits or the subject-matter thereof in which they were defendants. Indeed, the very ground of their defences was that they did not have any personal interest therein, but were acting as the agent or representative of their government. But this court, in all of those cases, held such a defence to be bad, and gave judgment against those defendants in the several cases, *as individuals,* upon the ground that they could not shield themselves behind their respective governments when they were

acting or assuming to act, under color of their office, beyond and outside of their authority as defined by the law.

That is all there is to this case on this point. The defendants to this bill, according to the theory of the bill (which on demurrer must be assumed to be correct), do not have and can never have any jurisdiction of any kind or character over the lands which are the subject-matter of the suit. Neither of them can have or assert any authority over, or make any order, rule, or regulation concering these lands. The United States does not have any interest, present or prospective, in the lands. Under these circumstances, therefore, how can it be said that these defendants, when they assume, in their official capacity, an authority and jurisdiction over these lands which they do not possess, and declare their purpose to sell the lands as public lands, and, under color of their offices, undertake to shield themselves behind the government of the United States, cannot be proceeded against by injunction to restrain them from committing a wrong against the State of Louisiana in respect to its property? And how can it be said that the State of Louisiana, in the face of the multitude of decisions of this court holding that executive officers can be sued *as individuals* when they are assuming to act beyond the scope of their legal authority, cannot sue these defendants *as individuals?* If they are suable *as individuals* (and this has been demonstrated), then how can it be said that their citizenship, if necessary, cannot enter into consideration in determining whether this court can entertain original jurisdiction in this case?

The recent cases of Minnesota *vs.* Hitchcock, and Oregon *vs* Hitchcock, *supra,* in which the suits were brought against the Secretary and the Commissioner of the General Land Office, by name, have been shown to be unlike this for the reason that in both of those cases the title to the lands, which were the subject-matter, was still in the United States, whereas, as will be shown later on in this brief, the title to

the lands involved in this case has passed out of the United States, and the United States does not have any interest, either present or prospective, in them. Hence, as before pointed out, these cases on this question of jurisdiction have no bearing at all on this case. It is a significant fact, however, that in the Minnesota-Hitchcock case so eminent a lawyer as the then Assistant Attorney-General for the Interior Department, Mr. Willis Van Devanter, now a Circuit Judge of the United States for the Eighth Circuit, did not object to the jurisdiction of this court on the ground that the Secretary of the Interior and the Commissioner of the General Land Office could not be made defendants to a suit brought under the original jurisdiction of this court by one of the States of the Union. As the majority of this court well knows, Mr. Van Devanter seldom, if ever, overlooked a point in his favor in any case in which he was interested as counsel, and the fact that he did not raise any objections on that score to the suit in that case is the best evidence that can be found that he did not consider it an objection worthy of consideration. Likewise, in the case at bar, if the position of eminent counsel for the defendants is understood, their objection to the jurisdiction of this court is based upon grounds other than the citizenship of the defendants.

The case of State of Georgia *vs.* Stanton, 6 Wall., 50, in some respects, is somewhat like this, although not wholly so. In that case the State of Georgia filed an original bill in this court, under its original jurisdiction, against Edwin M. Stanton, Secretary of War, General Grant, General of the Army, and Major-General Pope, assigned to the command of the Third Military District, consisting of Georgia and other Southern States, for the purpose of restraining them from carrying into execution the several provisions of what were known as the "Reconstruction Acts." As appears from the report of the case, the original jurisdiction of this court was invoked on the ground that the de-

fendants were each and all citizens of States other than Georgia. The bill was dismissed on the ground that the case, as made thereby, was one involving *political rights* of the State, and *not its property rights*, and that, therefore, this court did not have jurisdiction to consider or adjudicate *political* rights of the State. It is apparent, however, from a perusal, not only of the opinion of the court but also of the briefs on both sides, that had the case involved *the property rights* of the State, and had the relief sought been to protect those rights, an entirely different conclusion would have been reached. In fact, one cannot doubt, from a thorough consideration of the case as reported, that had the case been one involving the *property rights* of the State, and had the relief sought been to protect the property of the State, as in the case at bar, the court would have entertained the suit.

It has been shown by a long line of authorities that an official violating his authority, State or Federal, to the detriment of property rights of others, may be sued individually, and cannot be sued otherwise than as an individual. Therefore this suit, in theory and in fact, is against defendants Garfield and Dennett as individuals, based upon unlawful acts and purposes while in office. There is no law which requires either of them to give up their respective citizenship in Ohio and North Dakota upon their acceptance of office. This court will take judicial notice of the laws of those States which permit them to retain their citizenship therein and to exercise the right of franchise and other rights appropriate to citizenship. Their diverse citizenship is averred in the bill and, in legal effect, is admitted by the demurrer.

Article III, sec. 2, of the Constitution provides that:

> "The judicial powers shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . controversies . . . *between a State and citizens of another State;* . . .

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which *a State shall be a Party, the Supreme Court shall have original jurisdiction.*" (Italics supplied.)

Therefore, in the very language of the Constitution itself, this court has jurisdiction, if our contention is correct that the title to the lands in dispute passed out of the United States and beyond the jurisdiction of the officials of the Land Department upon the approval by the former Secretary of the Interior of the Swamp land list, embracing the same on December 10, 1895, in conformity to the provisions of the Act of March 2, 1849, under which the same were theretofore duly selected and reported by the Surveyor-General for Louisiana.

II.

Title in State. Defendants Without Jurisdiction.

The second, third and fourth specifications of demurrer read as follows, to wit:

> "Second. That it appears from said bill of complaint that the State of Louisiana has not now and never had any title, interest, or claim in or to the lands which are the subject-matter of this suit, for the reason that, at the date of the passage of the act of Congress under which the lands are claimed by said State, these lands, as alleged in said bill of complaint, were embraced within the limits of a military reservation theretofore established by order of the President of the United States, to wit, the Fort Sabine Military Reservation, in the State of Louisiana, and, therefore, were not intended to be and were not granted to said State under that or any other act.
>
> "Third. That it appears that the legal title to these lands remains in the United States, and under

such circumstances the acts complained of against these defendants and the acts sought to be enjoined, which are judicial and not ministerial in character, rest exclusively within the jurisdiction of the Interior Department of the Government in the administration of the public lands of the United States, and are not, during such administration, subject to examination or determination by this court.

"Fourth. That it does not appear that there has been any final adjudication by the defendants, or either of them, or by their predecessors in the Department of the Interior, in such administration of the public lands, or otherwise, which would have the effect of vesting title to these lands in the State of Louisiana, and that, therefore, action by them is not, at this time, subject to control, interference, or review by this court."

In the beginning of this argument, it was conceded as essential to the maintenance of this suit that the legal title to the land in question passed out of the United States and into the complainant upon the approval of the list; and it was suggested that, if this proposition can be sustained, the third and fourth specifications of demurrer, which are dependent upon the contrary view of the law, must be untenable; and, further, that it is immaterial to the disposition of this case in favor of the complainant whether Secretary Smith was right or wrong in his view as to the effect of the Military Reservation, if, as we contend, the legal title actually passed to the State upon the approval of the list.

The legal title to the land passed to the plaintiff upon the approval of list No. 51, on December 10, 1895, when the Land Department lost jurisdiction thereof; which jurisdiction could alone have been regained by successful suit on the part of the United States, brought prior to the statutory limitation provided by the act of Congress of March 3, 1891 (26 Stats., 1093).

The grant of March 2, 1849 (9 Stats., 352), as set forth in the second paragraph of the bill, was entitled "An act to aid the State of Louisiana in draining the swamp lands therein." By the first section thereof there was granted *in præsenti* to the plaintiff, for the purposes stated, "the whole of those swamp and overflowed lands which may be or are found unfit for cultivation."

By section 2 it is provided—

> "That as soon as the Secretary of the Treasury (now Interior) shall be advised by the Governor of Louisiana that the State has made the necessary preparation to defray the expenses thereof, he shall cause a personal examination to be made, under the direction of the Surveyor-General thereof, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation; and a list of same to be made out and certified by the deputies and Surveyor-General to the Secretary of the Treasury (now Interior), *who shall approve the same, so far as they are not claimed or held by individuals; and on that approval, the fee simple to said lands shall vest in the said State of Louisiana,* subject to the disposal of the legislature thereof," etc. (Italics supplied.)

The third and last section of the act specifies that when the greater part of any legal subdivision is of a swampy character the whole subdivision must be listed. The first proviso *expressly excludes all lands surveyed under the acts of March 3, 1811, or May 24, 1824.* The second proviso places upon the State the expense of surveying and selecting the lands passing under the grant.

The bill avers that the lands were all of the character defined by the grant; that none of them were surveyed under the acts of March 3, 1811, and May 24, 1824, or either of said acts; that they were selected and certified and reported by the Surveyor-General under and pursuant to the grant of March 2, 1849; that the Commissioner of the General Land

Office, by his decision of September 13, 1893, held that the executive order of December 20, 1838, operated so as to prevent the land from passing to the State under the grant of March 2, 1849, or the subsequent grant of September 28, 1850 (9 Stats., 519); that on appeal to the Secretary of the Interior this decision was reversed by Secretary Smith under date of October 31, 1895 (21 L. D., 357), copy of which decision constitutes Exhibit A to the bill, it being held by this final decision that the land passed by the grant of March 2, 1849, and was regranted by the subsequent grant of September 28, 1850, and the General Land Office was directed that the lands "be certified to the State of Louisiana under the swamp-land grants."

The bill further avers that, pursuant to said decision, the lands were described by the Commissioner in list No. 51, "in accordance with the rules and regulations," and it was recommended by the Commissioner to the Secretary that "list No. 51 *be approved*"; and that thereafter, on December 10, 1895, said list was approved by Secretary Smith, who used, among others, the following words:

> "The foregoing list No. 51 of swamp lands selected . . . is hereby *approved to the State of Louisiana* under the act of *March 2, 1849,*" etc. (Italics supplied.)

According to the terms of said grant of March 2, 1849, section 2, "*on that approval the fee simple to said lands shall vest in the said State of Louisiana,* subject to the disposal of the legislature." (Italics supplied.)

The legal title passes as completely by certification, if patent is not expressly required by law, as though patent actually issued.

> Garrigues *vs.* A., T. and S. F. R. R. Co. (6 L. D., 543).
>
> Roberts *vs.* Oregon Central Military Road Co. (19 L. D., 591).

The certification of land is equivalent to a patent therefor.

Wright *et al. vs.* State of California (8 L. D., 24).

Such certification exhausts the jurisdiction of the Land Department over the land.

In Re Louisiana, 1 Lester, 554.
Patrick Daily case (8 L. D., 471).
State of California *vs.* Baddy (9 L. D., 636).

Where a grant does not require the issuance of a patent, the certification of lands is equivalent to a patent, divests the Land Department of all jurisdiction over them or the title thereto, and it is in effect a decision that the lands thus certified are in fact subject to the grant, and the validity of such action can only be questioned in the courts.

Smith *et al. vs.* P. L. and L. S. Ship Canal Co. (11 L. D., 475).

Patent is the favored and more usual form of conveyance, especially as between the Government and individuals, but sometimes an act of Congress will pass the fee (Strother *vs.* Lucas, 12 Peters, 410-454; Ryan *vs.* Carter, 93 U. S., 78). The law sometimes makes a certified list of lands operative to transfer title to the grantee (Frasher *vs.* O'Connor, 115 U. S., 102). The power is with Congress to declare the form in which title which has been granted by the United States shall be evidenced. This Congress did by the act of March 2, 1849.

The Supreme Court has upheld as fundamental the doctrine that so long as the legal title to these (public) lands remains in the United States and the proceedings to acquire it are as yet *in fieri,* the courts will not interfere to control the exercise of the power thus vested in that tribunal.

"But that when by the action of these officers and the President in issuing a patent to a citizen, the title

> to the lands has passed from the Government, the question as to the real ownership of them is open in the courts to all the considerations appropriate to the case. And this is so whether the suit is by the United States to set aside the patent and recover back the title so conveyed, as in the United States *vs.* Stone (2 Wall., 525), or by an individual to cause the title conveyed by the patent to be held in trust for him by the patentee, as in Johnson *vs.* Towsley, 13 Wall., 72."
>
> United States *vs.* Schurz, 102 U. S., 378-396.

In Bicknell *vs.* Comstock, 113 U. S., 149, the principle is reaffirmed (quoting U. S. *vs.* Schurz, *supra*), "that where the patent has been executed by the president and recorded in the General Land Office, all power of the Executive Department over it has ceased." It was further said:

> "It is not necessary to decide whether this patent conveyed a valid title or not. It divested the title of the United States if it had not been divested before."

This is likewise absolutely true with respect to a list of swamp lands in Louisiana, granted by the act of 1849, to which has been attached the certificate of approval of said list by the Secretary of the Interior.

The custom of the Land Department respecting the approval of lists under the act of 1849 is that the list approved by the Secretary remains upon the files of the General Land Office as the official record of the act done, that office being the custodian of all such records.

In United States *vs.* Schurz, *supra*, speaking of the period when a transfer of title from the United States to another owner results from the action of the officers of the Land Department, the court says (p. 402):

> "It is equally clear that this period is, at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever

> this takes place, the land has ceased to be the land of the Government, or, to speak in technical language, the legal title has passed from the Government and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title."

In that case the question was as to the effect of the delivery or non-delivery of a patent which the law of the transaction constituted the appropriate means of evidencing the transfer of the title. The acts of Congress governing that case "provided for the record of all patents for land in an office and in books kept for that purpose." That having been done, the court said (p. 403):

> "This, then, is the final record of the transaction—the legally prescribed act which completes what Blackstone calls 'title by record'; and when this is done the grantee is invested with that title. . . . No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to have the title or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus."

In the case at bar the law (act of 1849) in express terms makes the approval of the list by the Secretary of the Interior the vehicle by which the fee simple vests in the State. It remains in all cases, as before stated, in the possession of the General Land Office, precisely as do all the official records, papers, and files of that office.

The defendant Garfield, as Secretary of the Interior, was not only without lawful power and authority to recall and vacate the approval of said list No. 51, and the proposed action of the Land Department in attempting to cancel said

list and make other disposition of the land, as charged in the bill, is not only likewise illegal, but the United States itself has specifically and distinctly waived and surrendered any possible right it may have had to institute any proceedings through the courts to that end.

By the act of March 3, 1891 (26 Stats., 1093), it is provided:

> "That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

This statute by analogy, if not by its expressed terms, applies with equal force where title passes by approval, as provided for by the act of March 2, 1849, as by patent.

This principle has long been recognized by the Land Department itself, as shown by the departmental authorities cited above.

The Land Department having lost jurisdiction by reason of the fact that the title passed from the United States to the plaintiff upon the approval of list No. 51, embracing said land, on December 10, 1895, it is clearly unlawful for the defendants to undertake the unlawful acts and proposed action of which complaint is made, and it is the duty and within the jurisdiction of this honorable court to restrain the defendants in accordance with the prayer of the bill for injunctive relief.

Defendants' Contention.

The defendants contend, in opposition to the above theory of vestiture of title and loss of jurisdiction by the Land Department:

First. That the subsequent *general* grant of September 28, 1850 (9 Stats., 519), so repealed and amended the *local*

act of March 2, 1849 (9 Stats., 352), as that title could only pass upon delivery of patent issued under and pursuant to said *general* grant of 1850.

Second. That, even if the first contention is not well founded, the *general* act of August 3, 1854 (Sec. 2449, U. S. R. S.), operated so as to amend and modify the *local act* of March 2, 1849, as that the certification required must comport with said *general* act of August 3, 1854.

These two propositions will be discussed in the order of their statement.

To sustain the first proposition, it would be necessary for the court to put aside both the contemporaneous construction and the uniform departmental construction for more than half a century to the contrary, and place the State of Louisiana and its grantees, in respect to hundreds of thousands of acres which have been certified to it under the act of March 2, 1849, at the mercy of officers of the Land Department, who, as in the case at bar, utterly disregard the doctrines of *stare decisis* and *res judicata*.

The act of March 2, 1849, was a *local* statute, confined in its scope to certain lands in Louisiana, and the lands surveyed under the acts of March 3, 1811, and May 24, 1824, *were expressly excepted from the operation of the grant*. While it was a grant *in præsenti*, the mode for identification was set out and the expense thereof was placed on the State, and title passes *on* approval of list.

The grant of September 28, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the 'swamp lands' within their limits," was a *general* statute, embracing all of the public-land States then in the Union.

It did not refer to the act of March 2, 1849, or modify its provisions in any particular. It contained no exception of lands surveyed under the acts of March 3, 1811, and May 24, 1824. It undoubtedly granted such lands in Louisiana which may have become swampy between March 2, 1849,

and September 28, 1850, and also such swamp lands in Louisiana as were surveyed under the acts of March 3, 1811, and May 24, 1824. The duty and expense was imposed upon the Secretary of the Interior to identify the lands passing under the general grant of 1850, and the legal title to such lands, so for the first time granted by the act of 1850, passes by patent; but, as to those lands in Louisiana which were theretofore granted to the plaintiff by the act of March 2, 1849, the different mode of procedure for the identification of the lands continued in force, the State paid the expense of segregation surveys and for employment of deputies, and title continued to pass by approval of lists thereof.

Such has been the uniform departmental construction and practice, and the two grants have been administered separately as two separate and distinct grants, including the two distinctive modes provided in the grants for passing title.

As early as December 23, 1851, Mr. Stewart, then Secretary of the Interior, instructed the Commissioner of the General Land Office that the acts of March 2, 1849, and September 28, 1850, were not to be construed *in pari materia;* that "the act of March, 1849, had reference to Louisiana alone, while that of September, 1850, is entirely different."

1 Lester's Land Laws, Regulations and Decisions, p. 549.

A glance at the official publications and records of the Land Department will show that the Acts of March 2, 1849, and September 28, 1850, have been, from the beginning to the present, separately administered in accordance with the provisions of said respective Acts. The uniform theory with regard to all lands granted by the Act of 1849 has been that they should be identified at the expense of the State and the legal title thereto should pass by the approval of lists thereof by the Secretary of the Interior. On the

other hand, the theory with regard to the administration of the Act of 1850 has been that no land should be selected thereunder which clearly passed by the former grant of 1849, and the Department has been careful to pass the legal title to the swamp lands which were excepted from the operations of the Act of 1849 by patent.

The care with which this distinction was maintained by the contemporaneous action of the officers of the Land Department is emphasized by the published reports and by the records of the Swamp Land Division of the General Land Office.

For instance, take the tabulations contained in the published report of the General Land Office for the year 1851, pages 126 to 156, both inclusive, from which it will be seen that the Surveyor-General was not only required to certify the selections under the proper grant, as the bill avers that he did with respect to the list of selections made under the Act of March 2, 1849, embracing the lands involved in the case at bar, but his report arranged the selections made in each township under separate headings indicating the areas which passed under the respective Acts of 1849 and 1850. This is shown by the following quotation of the heading for the tabulation from the publication mentioned, page 126, under which the selections made in 1851 were classified in the tabulation, to wit:

"Selected under the Act of March 2, 1849, and in accordance with the instructions of the Commissioner dated April 18, 1850."	"Selected under the Act of September 28, 1850, and in accordance with the instructions of the Commissioner dated November 21, 1850."

In his decision dated January 14, 1856 (1 Lester, 554), addressed to the Commissioner of the General Land Office, Mr. Secretary McClelland held that the Act of March 2,

1849, covers all the swamp and overflowed lands in Louisiana except the tracts specified and referred to in the second and third sections of the Act.

> "That the approval of the list directed to be prepared under Act of 1849 exhausts the power of the Secretary of the Interior over the subject matter, and he can no more, of his own motion, revoke or cancel any part of an approved list under that Act, after it has passed from him, than a patent for land after its delivery; that the Act of 1849 is not merged in the Act of 1850, but each is to be executed according to its special tenor and provisions, the latter being merely cumulative and embracing land which was excepted from the operations of the former."

This principle is recognized and followed by numerous decisions of the Land Department down to and including the latest departmental decisions on the subject.

In *State of Louisiana* (32 L. D., 270), rendered October 1, 1903, the Department held:

> "The legal title to the lands granted by the Act of 1849 passes to the State upon the approval by the Secretary of the Treasury (now Secretary of the Interior) of lists to be made out and certified by the deputies and Surveyor-General, and to those granted by the Act of 1850 by the issuance of patent under the direction of the Secretary of the Interior."

The direction of that decision was that all pending selections under the swamp-land grants of the State of Louisiana—

> "will be approved or patented to the State as they may have been selected under the grant of 1849 or 1850."

In State of Louisiana (unreported), rendered December 23, 1904 (subsequent to his effort to annul the list No. 51 herein, under date of June 6, 1904), Secretary Hitchcock,

in passing upon an appeal from the action of the Commissioner of the General Land Office refusing the application of the plaintiff for a segregation survey under the Act of March 2, 1849, and reversing the same, said:

> "To this end, a provision of the Act of 1849 may be invoked. Section 2 of that Act provided that the officer charged with the identification of the lands granted thereby to the State of Louisiana should upon the advice of the Governor, that the State had made the necessary provision to defray the expenses, cause a personal examination to be made, under the direction of the Surveyor-General, by experienced and faithful deputies, of all the swamp lands therein which are subject to overflow and unfit for cultivation.
>
> "This provision of the Act of 1849 was not repealed by the Act of 1850, and is in full force and effect in the State of Louisiana."

These departmental decisions, to the effect that the *local* Act of March 2, 1849 (9 Stats., 352), was neither repealed, modified, nor affected by the *general* Act of September 28, 1850 (9 Stats., 519), are borne out by the provisions of the United States Revised Statutes, wherein the *general* Act of September 28, 1850, is codified into sections 2479, 2480, and 2481, and no reference whatsoever is made to the *local* Act of March 2, 1849, which is left in its original form without any codification whatsoever. Said *local* Act of March 2, 1849, therefore remains in full force and effect as originally enacted (U. S. R. S., sections 5595, 5596, and 5597).

But counsel contend that the State of Louisiana is committed to the contention or estopped from denying that the act of March 2, 1849, was merged into and ceased to exist as an independent grant upon the passage of the act of September 28, 1850, because she brought suit against the United States for certain cash indemnity for swamp land, erroneously sold and patented to individuals by the United States after the date of the grant and before the identifica-

tion of the land, under the indemnity act of March 2, 1855 (10 Stats., 634), which general remedial statute made no reference to the act of March 2, 1849. It might with equal justice be said that the United States and all officers thereof are estopped from making such a contention by the fact that the State of Louisiana has been required, subsequent to the act of September 28, 1850, to defray the expense of surveys and the selection of lands under the act of March 2, 1849, and to conform to the uniform rulings of the Land Department, as shown, to the effect that both grants subsist and must be administered separately.

As a matter of fact, the records in the cases of the United States *vs.* Louisiana (123 U. S., 32; 127 U. S., 182), do not show that the lands for which indemnity claims were granted by the Land Department on which said suits were brought were or were not within the exceptions to the grant of 1849.

As was held by the Attorney-General of the United States in the opinion cited in the brief of counsel for the defendants, the indemnity act of March 2, 1855, was a remedial statute, intended by Congress as a means whereby to relieve the United States of the injury it would otherwise have done in selling lands which had theretofore been disposed of by a grant or grants *in præsenti;* and, although the grant of September 28, 1850, was alone specifically referred to therein, the Attorney-General of the United States, in that opinion, gave it as his opinion that, in the liberal construction which a remedial statute of the kind requires, the Department was authorized thereby to pay over to the State of Louisiana the consideration received by the United States for lands granted by the act of March 2, 1849, which *were sold between the date of that grant and the date of the act of September 28, 1850.* Had the State been unwilling to accept this plan of settlement, it would manifestly have operated to the detriment of the grantees of the United States, as the superior rights of the State attached to all swamp lands covered by the grant as of the date thereof.

The contention of counsel for defendants to the effect that the local grant of March 2, 1849, was merged into and superseded by the subsequent *general* grant of September 28, 1850, and that the latter act, therefore, from the date of its passage constituted and provided the method whereby the legal title should be thereafter transmitted to the State by means of a patent, instead of by the approval of lists, as specified in the act of 1849, is shown by the foregoing authorities to be contrary to the contemporaneous and uniform construction of the Land Department to the effect that said grants were separate and distinct and should be administered under and in accordance with the specific provisions set forth in each of them.

By reference to the statutes themselves, it will be observed that the act of March 2, 1849, was a *local* grant *in præsenti*, containing provisions for administration peculiarly adapted to the physical condition, and, doubtless, political relations or agreements between the Louisiana authorities and the representatives in Congress.

Among the peculiar features of this statute, not found in the subsequent general statute, might be mentioned:

First. The State was to participate in the appointment of Deputy United States Surveyors, who made the selections at the *expense of the State.*

Second. Segregation surveys were thus permitted, which was peculiarly appropriate to a State, so thoroughly and extensively affected by overflows as was Louisiana at the time. This feature enabled the selection and approval to the State, under the act of March 2, 1849, of large areas prior to the extension of the lines of Government surveys, which it was then impracticable to run at all in some parts of the State.

The act of 1849 was a grant *in præsenti*, taking effect upon the date thereof. None of the authorities cited by counsel involve statutes of this character.

The case of Rodgers *vs.* United States, 185 U. S., 83, is an effective answer to all of their contentions on this point.

The claim of defendants to the effect that, subsequent to September 28, 1850, only one swamp-land grant existed or was in operative effect in the State of Louisiana, is opposed to a legislative construction by Congress itself.

The act of Congress, known as the "Gay Act," approved March 2, 1889 (25 Stats., 877, 878), entitled "An act to restore to the public domain and to regulate the sale and disposition of certain lands east of the Mississippi River, in the State of Louisiana," in its last proviso, reads as follows:

> "That nothing in this act shall preclude the State of Louisiana from enforcing its claim to said residue of public lands under the *acts* of Congress granting swamp lands to the several States of the Union."

It will be observed that this statute, passed in 1889, speaks of the swamp land *grants* in force in Louisiana, not as act, but as *"acts,"* using the plural number.

There is absolutely nothing in the contention of counsel for the defendants that the lands which passed under the grant of March 2, 1849, required a patent to pass title. This proposition is controverted by the contemporaneous, continuous and present construction of the Land Department itself, and is diametrically opposed to the seriously urged contention of counsel for defendants to the effect that the land should have been certified under the act of August 3, 1854 (Sec. 2449, U. S. R. S.), which will be discussed below.

The judgment rendered by the Secretary of the Interior in the form of this decision of October 31, 1895 (21 L. D., 357), which was executed by the approval of said list No. 51 on December 10, 1895, was to the effect that the land first passed under the grant of March 2, 1849 (under which the lands were identified and reported by the Office of the Surveyor-General), and also by the subsequent grant of September 28, 1850.

In contemplation of law, it is contended that the first grant *in præsenti* governs, because where two Acts of grant, one

of an earlier and another of a later date, are each broad enough in their terms to embrace the same property, under the well-known rule of law, title must be regarded and held to have passed by the first grant, under the principle, *prior est tempore, potior est in jure.*

9 Opin. Att'y Gen., 254.
Wright *vs.* Roseberry (121 U. S., 488-502).
Rogers *vs.* United States (185 U. S., 83).

It thus appears, beyond question, that the land not falling within the exception from the grant of March 2, 1849, but expressly embraced within its terms of grant, having been selected and identified under that grant, and said grant being unrepealed or modified by the Act of September 28, 1850, or the Revised Statutes, the appropriate means for the passing of legal title was and remained by approval, under section 2 of said Act of March 2, 1849, which provides that "on that approval the fee simple to said lands shall vest in the said State of Louisiana."

The use of the words "as supplemented and enlarged by the Act of September 28, 1850," in said approved list, in no wise limited, restrained, or affected by the operative force or legal effect of the approval, "under the Act of Congress of March 2, 1849"; its manifest object was to emphasize the conclusion of the Department, as a matter of law, as distinctly stated in the decision of October 31, 1895 (21 L. D., 307), pursuant to which the list was submitted for approval; that said lands were granted to the State not only by the Act of 1849, under which they had been identified, but the Act of 1850 was sufficiently broad to have embraced such lands also, had they not been granted by said Act of 1849. Certain it is that said words could in no wise restrain, limit, or qualify the approval, and the consequent vestiture of title under the Act of March 2, 1849. Indeed, the reference to the Act of 1850 may more properly be regarded as given by

way of further assurance that the lands did not fall within any exception contained in the grant of swamp lands made by the Act of 1849 or that of 1850; but, being within the scope of both of these grants, they were accordingly approved to the State in the manner provided and specified in the said earlier grant.

As has been shown, the language used in the certificate approved by Secretary Smith embraced everything requisite to an approval under the Act of March 2, 1849. Such additional expressions, not required by that statute to be used, however, may be treated in law as mere surplusage and may be wholly disregarded in determining the legal effect of the approval under the Act of 1849.

Kounts *vs.* Omaha Hotel Co. (107 U. S., 378).

The defendants apparently recognize the weakness of their contention on this point by going outside of the record before the Court for expressions contained in the letter from the Honorable Secretary of the Interior to the Commissioner of the General Land Office, dated June 6, 1904, long subsequent to the loss of jurisdiction by the Land Department, quoted in part on page 24 of defendants' brief. If this defense is to be urged at all, it can only be at the hearing of the case on its merits, when the documentary evidence upon which the Secretary arrives at his conclusions can be presented, as findings of fact by the Secretary of the Interior after loss by him of jurisdiction is not binding upon this Court.

Assuming for the sake of argument that the Register of the State Land Office did ask the Land Department to permit an amendment of the list to the extent of adding other lands to it, the misconception or error of this administrative officer of the State, with no power to bind it to the extent of reconveyance of the title which had theretofore passed to the State by the approval of the list, cannot justify the erroneous conclusion reached by the Secretary of the Interior

as to the legal effect of the approval theretofore made, as defined by the statute itself.

The first proposition of the defendants, under discussion, is therefore untenable; the Act of 1849 was not in anywise repealed, amended, modified, or affected by the Act of 1850, and the legal title passed by the approval of the list, on December 10, 1895, under the terms of said grant.

Act of August 3, 1854, Inapplicable.

The second, or alternative, contention of the defendants is likewise untenable.

The proposition of defendants is stated on page 23 of their brief as follows:

> "There is another reason for concluding that the legal title has not passed. By an act of August 3, 1854 (R. S., sec. 2449), Congress provided:
>
> " 'That in all cases where lands have been, or shall hereafter be, granted by any law of Congress to any one of several State and Territories, *and where such law does not convey the fee-simple title of the lands*, or require patents to be issued therefor, the list of such lands which have been, or may hereafter be *certified by the Commissioner of the General Land Office*, . . . shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby.'
>
> "In the case now before us there was no such certificate." (Italics supplied.)

That the defendant, Garfield, and his immediate predecessor in office, in the light of the more recent decisions of this Court, disagree with the interpretation by Secretary Smith of the Swamp Land Laws, and their effect upon lands in a state of reservation at the dates of the swamp land grants, in adjudging the lands in question to the State of Louisiana, can-

not be questioned. It is not unnatural that, entertaining such views, an effort should be made to place those views into practical effect. To do this, it was necessary for the defendant, Garfield, and his predecessor, to find, as a matter of law, that the jurisdiction of these lands had not been lost by the approval of Secretary Smith on December 10, 1895. The language quoted, we think improperly, from the Departmental action in the matter is argumentative in the extreme, and constitutes the first claim which has ever been made by any official of the Land Department, so far as we are able to find, that the act of 1854 has any application whatsoever to the lands passing under the grant of March 2, 1849.

Indeed, Mr. Secretary Hitchcock, who makes this remarkable discovery, June 6, 1904, in his vain effort to find ways and means to place his conclusion into practical operation, in less than two years prior thereto, in a well-considered case, known as the State of Louisiana (32 L. D., 270), rendered October 1, 1903, held:

> "The legal title to the land granted by the act of 1849 passed to the State *upon the approval by the Secretary* of the Treasury (now Secretary of the Interior) of lists to be made out and certified by the Deputy and Surveyor-General, and to those granted by the act of fifty by the issuance of patents under the direction of the Secretary of the Interior." (Italics supplied.)

In the same decision the Department gave detailed instructions to the General Land Office for the further administration of these two grants, and the direction of that decision was that all pending selections under the swamp-land grants of the State of Louisiana—

> "Will be *approved* or patented to the State as they may have been selected under the grant of *1849* or 1850." (Italics supplied.)

These directions stand to-day without modification.

The purpose of this *general* statute, which has never before been held by the Land Department as applicable to lands granted by the *local* act of March 2, 1849, was clearly that of supplying a means for the conveyance of the legal title to lands which had been or might be granted to States or Territories by statutes *containing no specific provision for the passage of such legal title.* Such a statute was involved in the case of Weeks *vs.* Bridgman (159 U. S., 541).

This contention is borne out both by the language of the statute italicized above and also by the title of the original statute, entitled "An act to . . . vest the title in fee of lands which have been or may be certified," etc. (10 Stats., 346).

The statute clearly does not apply to lands passing under the grant of March 2, 1849, which contained no provision for certification "by the Commissioner of the General Land Office," but does contain the specific provision for the passage of the legal title, contained in the second section of the grant, to wit, *"on that approval* (of list by Secretary), *the fee simple to said lands shall vest in the State of Louisiana."*

Take the lands which were selected under the act of 1849 and listed and approved between March 2, 1849, and August 3, 1854. The fee-simple title had clearly vested in the State "on that approval." Could the retroactive provisions of the act of August 3, 1854, serve to "vest the title in fee" which had already been vested?

The act of 1849 was a grant *in præsenti*, the legal title to the lands granted to pass upon identification and to be evidenced by the approval by the head of the executive department having jurisdiction over public lands; the title to be the best "in fee simple," as it was contemplated by the grant that the lands would be sold by the State for funds with which to carry on the work of reclamation by drainage. Suppose, for the sake of argument and not otherwise, that it was within the power of Congress to so amend this act as

to vouchsafe a less stable title, such as approvals under the act of 1854 are regarded to be, is it reasonable to suppose that Congress would not have made more clear its purpose so to do than was done by the act of 1854? No reference is made therein to the act of March 2, 1849, and, as shown, said grant was not subject to the infirmity sought to be cured.

List 51 was approved subsequent to the codification of said act of 1854 as section 2449 of the Revised Statutes of the United States. As shown above, this codification expressly, by sections 5595, 5596, and 5597, excluded *local* acts of the character of the act of March 2, 1849, which act was not codified in the Revised Statutes, although the general swamp-land grant of September 28, 1850, and the amendments thereto were so codified in sections 2479, 2480, and 2481.

By section 5595, "Title LXXIV, Repeal Provisions" of the Revised Statutes, it is declared that —

> "The foregoing seventy-three titles embrace the statutes of the United States, general and permanent in their nature, in force on the 1st day of December, one thousand eight hundred and seventy-three * * *."

Section 5596 is as follows:

> "All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, *any portion of which is embraced in any section of said revision,* are hereby repealed and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided,* That the incorporation into said revision of any general and permanent provisions, taken from an act making appropriations, or from an act containing other provisions, of a private, *local* or temporary nature, shall not repeal,

> or *in any way affect any* appropriation, or any provision of a private, *local,* or temporary character contained in any of said acts, *but the same shall remain in force; and all acts of Congress passed prior to said last-named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment.*" (Italics supplied.)

Section 5597:

> "The repeal of the several acts embraced in said revision shall not affect any act done, or right accruing or accrued, or any suit or proceedings had or commenced in any civil cause before the said repeal, but all rights and liabilities under said acts shall continue, and may be enforced in the same manner, as if said repeal had not been made; nor shall said repeal in any manner affect the rights of any office or change the tenure thereof."

It thus clearly appears that the Act of August 3, 1854 (U. S. R. S., sec. 2449), is in no way applicable to lands passing or approved to the State by the Secretary under the Act of March 2, 1849.

It is contended by the former Secretary of the Interior, in the extract quoted on page 24 of brief of counsel for defendants, that the application of the Act of 1854 to lands granted by the Act of 1849 would constitute no material change in the original grant, by requiring the Commissioner of the General Land Office to certify the lists presumably as approved by the Secretary of the Interior, under and in accordance with his final decision thereon. As the title passes under the grant upon approval of the list by the Secretary, what the Commissioner could do would be purely ministerial and would not affect the question of the passage of the title any more than would his ministerial acts in delivering a recorded patent issued under the settlement laws.

While it is denied that the Act of 1854 applies to lands passing under the grant of 1849, as has been shown; yet,

even if it did, it would not be within the jurisdiction of the defendant Garfield to revoke the approval and have the defendant Dennett cancel the list No. 51, which had been approved by his predecessor, Honorable Hoke Smith, under date of December 10, 1895.

In the case of Noble *vs.* Railroad (147 U. S., 165, 176), cited with approval, in the case of Weeks *vs.* Bridgman (159 U. S., 54), this Court said:

> "A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void. As was said by Mr. Justice Grier in United States *vs.* Stone, 2 Wall., 525, 535, 'one officer of the Land Office is not competent to cancel or annul the act of his predecessor. That is a judicial act and requires the judgment of a Court."

This doctrine was not overruled or modified in the case of Weeks *vs.* Bridgman (*supra*), which involved an action brought in a State Court to determine the adverse claims of the parties, both of whom stood on paper title. One of them relied upon a certification under the Act of 1854, based upon a railroad grant to Minnesota by Act of May 22, 1857, and the other under a patent of the United States, issued by authority of law, to a pre-emption claimant. This Court found that the claim of the pre-emptor having, by decision of the Secretary of the Interior of August 30, 1861, been held to have attached prior to definite location of the line of the railroad, the title to the land did not pass under the congressional grant to the State, and that the inclusion of the land in lists certified to the State on October 25, 1[illegible] under the Act of August 3, 1854 (10 Stats., 346), as a part of the lands granted by the Act of 1857, "was ineffectual," and that as against the pre-emption claimant "the certification had no operative effect."

The case of Brown *vs.* Hitchcock (173 U. S., 473), cited

by counsel for defendants, involved lands selected under the grant of 1850, requiring delivery of patent to pass title. Until title passed out of the United States, this Court very properly held that it had no jurisdiction.

It has thus been shown that the Act of August 3, 1854, does not apply to lands granted under the Act of March 2, 1849, and that, even if it did, the approval of list No. 51 by the Secretary of the Interior on December 10, 1895, passed the title to the plaintiff, and it is beyond the power and lawful authority of the defendants or either of them to take action, of which complaint is made herein, deleteriously affecting the rights and interests of the plaintiff.

III.

Act of February 24, 1871.

The fifth specification of demurrer, and the argument of defendants in support thereof, are to the effect that, inasmuch as the Act of February 24, 1871, 16 Stat., 430, authorizing the discontinuance of the military reservation at Fort Sabine, directed the Secretary of the Interior to dispose of the lands embraced therein "for cash, according to the existing laws of the United States relating to the public lands," therefore that act was a legislative declaration that the lands embraced therein did not pass to the State under the swamp-land grant of 1849, and hence the granting of the injunction herein prayed for "would be an interference and restraint upon the political branch of the Government in its transactions with a sovereign State of the Union." In other words, the substance of this contention on the part of defendants is, that the Act of 1871 was a declaration that the lands in the Fort Sabine Military Reservation did not pass to the State under the swamp-land grant of 1849, and that, therefore, the granting by this Court of the writ of injunction as prayed in the bill would be an injunc-

tion to restrain the Secretary of the Interior from executing an Act of Congress, or, in the language of defendants' brief, "would be to enjoin the enforcement of an Act of Congress."

To this contention several answers may be made:

First. It does not appear from anything in the bill itself and it has not been suggested that the land involved in this suit comprised *all* of the lands which were embraced in the Military Reservation. On the contrary, the presumption would necessarily be that there were other lands embraced in the Reservation that were not swamp in character, for it is not to be presumed that the United States Government would locate, or did locate, a military reservation wholly upon swamp and overflowed lands. On the contrary, the most reasonable presumption that can be indulged in this regard is, that at least a considerable quantity of lands embraced in the military reservation were not of the character subsequently declared by the act of 1849 to be swamp and overflowed. The health of the garrison and various other military considerations effectually precludes the idea that no lands other than swamp were included in that reservation. Hence, if this be so, as the presumption, in the absence of anything to the contrary, would appear to be, there would still be some lands within the military reservation after its abandonment upon which the act of 1871 could operate.

Second. But even conceding, for the purpose of this argument, but not admitting the fact, that all of the lands included in the military reservation at Fort Sabine were actually swamp and overflowed, within the meaning of the swamp-land act of 1849, and that there were no lands, in so far as that reservation is concerned, upon which the act of 1871 could operate, save and except these swamp lands, it is sufficient to say that, in so far as the particular lands here in suit are concerned, the Secretary of the Interior, by his said decision of October 31, 1895 (21 L. D., 357), set out in the bill and as an exhibit thereto, decided that these particular lands, notwithstanding the act of 1871, actually

595

passed to the State under the swamp-land act of 1849. The Secretary in making this decision was certainly within his legal authority and jurisdiction. He had authority to make the decision, and he had the authority to direct that a list of these lands should be made by the Land Office to carry out his views and instructions therein contained. It was a proper matter for him to decide, and his decision, therefore, was the legal expression of the views of his Department upon that question. Whether that decision was a correct interpretation of the law is not the point in issue herein. It is enough that it was a decision by the Head of the Interior Department, upon a matter entirely and exclusively within his jurisdiction; and the listing of the lands in accordance with the directions contained in that decision, effectually passed the title out of the United States into the complainant, as has been already shown in this brief. The title having thus passed out of the United States, and the bar of the statute of limitations (act of March 3, 1891, *supra*,) having intervened without any action of the United States to recover such title and even long prior to any action by the Department looking to proceedings to recover such title, it is now too late to raise any question as regards the legality of that decision of the Secretary and of the subsequent action of the Land Department in carrying out the instructions therein contained.

Third. It is incorrect to say, that the act of 1871, *supra*, is any longer, if it ever was, a direction to the Secretary of the Interior to dispose of the lands in question, for the reason that Congress by the later act of March 3, 1891, *supra*, has expressed its will that after the expiration of six years from the issue of patent to the State, no suit, and manifestly no other proceeding, looking to the recovery of the title, should be brought or had; and therefore that period having elapsed, has removed from the United States and certainly from the Secretary of the Interior, as to the lands in question, whatever duty may have devolved upon him under the

said act of 1871, and has imposed upon him, and all other officers of the United States the new duty of non-interference with the title conveyed by said patent.

We respectfully submit that the duty of non-interference imposed upon the Land Department by the later act of 1891 is controlling and is so inconsistent with that provided by the prior act of 1871, as to this land, that it is plain the Honorable Attorney-General has been led into error in supposing that said act of 1871 constitutes any authority for the action of the Land Department sought to be restrained by the pending bill, or that the relief prayed for seeks to control any duty or discretion lodged in that Department, or to interfere with the political branch of the Government in its transactions with a sovereign State.

Fourth. The action of Mr. Secretary Smith of 1895, before referred to, and the issue of title to the State by certification, followed by the lapse of time and the operation of the bar of the Statute of Limitations, constituted an exercise of the discretion and duty, as he saw it, which the act of 1871 had imposed upon the Secretary of the Interior, and effectually removed the lands from the further jurisdiction of the Land Department, and from any right or duty to assail the title so conveyed.

Fifth. It is to be observed that said act of 1871 provided for the disposal of lands in a number of military reservations, other than that of Fort Sabine, and that nothing appears to show that Congress was advised that the State of Louisiana was claiming the lands within the latter reservation under the swamp land grant. There was no express declaration by Congress that said lands were not swamp in character, and none can be implied, especially as said act was careful to provide that the lands in the various reservations should be sold "for cash, according to the existing laws of the United States relating to the public lands."

Lands claimed as swamp, as were these when the said act

was enacted, were not subject to sale under the existing public land laws, pending the adjudication of the claim, nor were lands previously granted by any act of Congress subject to such sale, and when the Secretary of the Interior identified the lands in question to be swamp, and adjudged that they passed to the State under the swamp land grant, and they were certified pursuant to the grant under which they were claimed, no existing law authorized their sale. The Secretary discharged the duty imposed by the act of 1871 when he held, in the exercise of his discretion, that the lands in controversy were not subject to sale thereunder. The act of 1891 was notice to the Department that if his conclusion was considered to be wrong, suit must be brought to set aside the certification within six years from the issue of the certificate of title. That period having elapsed, and no suit having been brought, there no longer remains in the Land Department any duty under the act of 1871, but its hands are now controlled by the limitation provided by the act of 1891, which imposes upon it the new duty of non-interference with the title passed to the State.

IV.

Injunction the Proper Remedy.

The sixth specification of demurrer and the argument in support thereof are simply to the effect that if, as contended on behalf of the complainant, the legal title, "has become vested in the State, then the proper remedy is an action at law" to recover possession of the land; and that "an action of ejectment is an adequate and the only proper remedy."

The answer to this contention is, that the complainant is already in possession of these lands, and an action of ejectment cannot lie to recover lands in the complainant's possession. Neither is there any other action at law that can

be brought by the complainant in respect of these lands. This contention on behalf of the defendants wholly misconceives and misinterprets the theory of the bill, which is, that the complainant, having a title good and valid to the lands in question and being in possession of them under such title, the defendants are threatening to destroy the evidences of its title and to sell the lands *as public lands* to individuals which would result in a multiplicity of suits.

It is inconceivable that, in such a case, equity will not protect the complainant from this threatened invasion of her *rights of property* and the peaceful enjoyment thereof. One of the chief provinces and functions of a court of chancery is to afford relief in cases of this character, it being manifest that there is no adequate remedy at law.

As stated by this court in *Noble* vs. *Union River Logging Company*, 147 U. S., 165, 172:

> "If he (the Secretary of the Interior) has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

And the court, as authority for this holding, referred to the case of Board of Liquidation *vs.* McComb, 92 U. S., 531, 541, where it was said that—

> "When a plain official duty, requiring no exercise of discretion * * * is *threatened to be violated by some positive official act*, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." (Italics supplied.)

See also *Osborn* vs. *Bank of United States*, 9 Wheat., 738; *Pennoyer* vs. *McConnaughy*, 140 U. S., 1; *Allen* vs.

Baltimore & Ohio Railroad Company, 114 U. S., 311, 314-317; *Scott* vs. *Donald*, 169 U. S., 107; and cases cited in the opinions in those cases.

Upon the averments of the bill, and under the decisions referred to, there cannot be any possible doubt of the fact that the proper remedy in this case is in equity to restrain the defendants, as prayed in the bill.

GEORGE H. LAMAR,
HARVEY M. FRIEND,
Of Counsel for Complainant.

STATE OF LOUISIANA *v.* GARFIELD, SECRETARY OF THE INTERIOR.

ORIGINAL IN EQUITY.

No. 7. Argued October 27, 28, 1908.—Decided November 9, 1908.

This court has no jurisdiction of an action brought by a State against the Secretary of the Interior to establish title to, and prevent other disposition of, lands claimed under swamp land grants where questions of law and fact exist as to whether the United States still owns the lands. The United States is a necessary party, and the action cannot be tried without it.

THE facts are stated in the opinion of the court.

The Attorney General and *The Solicitor General*, with whom *Mr. Glenn E. Husted* was on the brief, for defendants, on demurrer:

The United States is the real party in interest as defendant, and as it has not consented to be sued, and cannot be sued without its consent, the bill must be dismissed. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Kansas* v. *United States*, 204 U. S. 331.

The point determined by the Secretary of the Interior in 1895 was not a matter of fact and merely quasi-jurisdictional as in *Noble* v. *Union River Logging Co.*, 147 U. S. 164, 173, but was a question of law and strictly jurisdictional expressly within the classification of that case, which included the instance where "the Land Department issues a patent for land

which has already been reserved or granted to another person." The act then is not voidable merely but void. This was the character of the Secretary's action, involving a manifest mistake of law.

Even if the court had jurisdiction the suit must fail because these military reservation lands were not intended to be and were not covered by the swamp land grant. Such grants are to be interpreted most strongly in favor of the Government, and nothing passes but what is clearly included within the terms of the grant. *Rice* v. *Railroad Co.*, 1 Black, 358; *Wilcox* v. *Jackson*, 13 Pet. 498; *Leavenworth &c. R. R.* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761; *United States* v. *Michigan*, 190 U. S. 379. Congress could not have intended to grant to the State any interest as of the date of this swamp land act in lands then reserved and occupied for military purposes, and the act of February 24, 1871, 16 Stat. 430, transferring the Fort Sabine military reservation to the Interior Department shows that it was not the understanding of Congress that the grant applied to the reservation lands.

Furthermore, the approval by the Secretary of the Interior of the Surveyor General's certified list of swamp lands under the act of 1849, as amended by the act of 1850, connects and merges the special act of 1849 with the general act of 1850, and therefore this approval was merely an additional step and a patent as provided under the act of 1850 was necessary. No such patent has been issued and under the later act the legal title passes only upon delivery of the patent. *Brown* v. *Hitchcock*, 173 U. S. 473. This is not a case for the application of the rule that a posterior general act does not repeal a prior special provision unless the legislative intent to repeal be apparent. *People* v. *Jaehne*, 103 U. S. 182. The act of 1850 is to be regarded as the final expression of the legislature on swamp land grants; the requirements and method of conveyance of that act take the place of the special law and must be taken as substituted for the special law. *Morris* v. *Crocker*,

13 How. 429; *United States* v. *Tynen*, 11 Wall. 88; *Murdock* v. *City of Memphis*, 20 Wall. 590. This is also the conclusion to be drawn from the Revised Statutes, because the act of 1850 is the code there, and while some special swamp land provisions as to other States are preserved, this is not the case as to Louisiana.

The State by the action of its officers has apparently considered that a patent was necessary. After approval by the Secretary of the Interior in 1895, the register of the state land office, assuming to act under authority of an act of the state legislature, protested against the *patenting* of the lands embraced in the approved list as not described in accordance with the latest approved survey thereof, and sought to correct the description before the patent was to be issued. 33 Land Dec. 16. And again, the State of Louisiana instituted proceedings in the Court of Claims to recover money alleged to be due under the act of March 2, 1855, 10 Stat. 634, which provided for the patenting of lands to persons who prior to the issuance of patents to the States under the act of 1850 had located upon swamp lands, and for the payment to the States of the purchase money as indemnity.

Even if an actual patent was not necessary under the act of 1850, something more than bare approval was required. See act of August 3, 1854 now § 2449, Rev. Stat., providing for lists being *certified* by the Commissioner of the General Land Office. In this case there was no such list, and since the Secretary's mere approval was not given until long after the act of 1854 was passed, it was within the power of Congress to provide a different means of administering the grant as to land not already approved.

Mr. George H. Lamar and *Mr. Harvey M. Friend* for complainant, on demurrer:

According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by

reason of a certain congressional statute of limitation and repose the title so conveyed is no longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

The cases cited by the counsel for the defendants in support of the demurrer herein do not sustain the contention that this suit cannot be maintained because it is in effect a suit against the United States, which has not consented to be sued. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Naganab* v. *Hitchcock*, 202 U. S. 473; and *Kansas* v. *United States*, 204 U. S. 331, discussed and distinguished.

The Secretary of the Interior and the Commissioner of the General Land Office are but creatures of the law, and mere agencies created by the law to carry it into practical operation, and neither of them should be permitted to exert his agency in violating the law and the Constitution and then claim exemption from the process of the court, whose duty it is to guard against abuses, on the ground that they are executive officers of the Government and cannot be restrained from violating the law. *Marbury* v. *Madison*, 1 Cranch, 137; *Noble* v. *Union River Logging Co.*, 147 U. S. 165, and cases cited.

This court has pointed out in numerous opinions that similar suits to enjoin an executive officer from executing an unconstitutional statute, or where such officer has been proceeded against on the ground that he is acting or assuming to act beyond the scope of his authority, were not against the State, but were against its officers who were assuming to act under an unconstitutional statute or were assuming to act *ultra vires* to the great and irreparable injury and damage of the com-

plainants in their property rights. *Osborn* v. *Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 220; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Allen* v. *Baltimore & Ohio R. R. Co.*, 114 U. S. 311 (these last two being known as the *Virginia Coupon cases*); *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Stanley* v. *Schwalby*, 147 U. S. 508; *Tindal* v. *Wesley*, 167 U. S. 204; *Scott* v. *Donald*, 169 U. S. 58, 107; *Smyth* v. *Ames*, 169 U. S. 466; *Prout* v. *Starr*, 188 U. S. 537; *Ex parte Young*, 209 U. S. 123, and cases cited and referred to in the opinions in those cases.

Under many authorities, this court can entertain this suit under its original jurisdiction. *United States* v. *Texas*, 143 U. S. 621, 644; *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 287; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 388; *Pennsylvania* v. *Wheeling Bridge Co.*, 13 How. 518, 560; *Mississippi* v. *Johnson*, 4 Wall. 475, 501; *Texas* v. *White*, 7 Wall. 700, 719; *Pennsylvania* v. *Quicksilver Co.*, 10 Wall. 553, 556; *Florida* v. *Anderson*, 91 U. S. 667.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claims under the statutes of the United States, and to enjoin the defendants against carrying out an order making a different disposition of the lands. The defendants demur on the grounds that this really is a suit against the United States, which has not consented to be sued, that the title never has passed from the United States, and that the remedy, if any, would be at law.

The act of March 2, 1849, c. 87, 9 Stat. 352, purported to grant to the State of Louisiana the whole of the swamp and overflowed lands therein, and provided that on approval of a list of such lands by the Secretary of the Treasury (afterwards succeeded by the Secretary of the Interior) the fee simple to the same should vest in the State. Certain lands were ex-

cluded, but those in dispute were not by any express words. They belonged, however, to the Fort Sabine Military Reservation, established by the President on December 20, 1838, and although included in a list submitted under the statute, approval of the inclusion was suspended or denied. On March 25, 1871, the Fort Sabine Military Reservation was abandoned by executive order, in pursuance of the act of February 24, 1871, c. 68, 16 Stat. 430, which authorized the Secretary of War to transfer it to the control of the Secretary of the Interior, to be sold for cash. On October 31, 1895, the Secretary of the Interior decided that the land was included in the grant of the act of 1849, subject to the right of the United States to use it for military purposes until abandoned. On December 10, 1895, pursuant to his decision, the Secretary indorsed upon a list of these lands that it was "Approved to the State of Louisiana under the Act of Congress of March 2, 1849, as supplemented and enlarged by the Act of Congress of September 28, 1850, subject to any valid adverse rights that may exist." The plaintiff says that thereupon the title passed.

On June 6, 1904, the Secretary of the Interior ordered that his predecessor's approval of the list be vacated, and that the lands should be held for disposition as provided by law, on the ground that they were not within the grant of the act of 1849, because at that time embraced in a military reservation. This decision has been upheld and finally affirmed by the present Secretary, the defendant in this case, and the result is the bringing of this bill.

We will assume for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit; for we are of opinion that even on that assumption the bill must be dismissed. But before giving the reasons for our opinion the course taken by the argument for the United States makes it proper to state a portion of that argument that does not command our assent.

The next year after the act of 1849 another act was passed,

which granted swamp lands to the State of Arkansas. It provided for a list, required the Secretary of the Interior to issue a patent for the lands at the request of the Governor, and then enacted that "on that patent" the fee simple to the lands should vest in the State. The fourth section was more general: "That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as [*sic*] designated as aforesaid, may be situated." Act of September 28, 1850, c. 84, 9 Stat. 519. It is argued that this so far repealed the special act of 1849 that thereafter the title would not pass on simple approval as provided therein, but a patent was necessary. As we understand, the continuous construction of the Department has been to the contrary, and a great number of titles to a very large amount of land would be disturbed if we should accede to this argument. We see no reason for overthrowing the long continued understanding that the special provisions for Louisiana were not affected by a general clause, evidently intended to extend benefits to States that did not enjoy them at the time, not to change the mode of conveyance previously established in a case where the benefit already had been conferred. We may add that we assume that, if approval was sufficient to pass the title, the form of words used by the Secretary of the Interior on December 10, 1895, had that effect, notwithstanding the reference to the act of 1850, whatever may have been his understanding or intent.

A further argument was presented that if a patent was not necessary under the act of 1850, then a certificate by the Land Commissioner was made so by the act of August 3, 1854, c. 201, 10 Stat. 346, Rev. Stat. § 2449. But that law does not require so extended an application. We shall assume for purposes of decision that it is satisfied if confined according to its words to lands to which the act of 1849 did not purport "to convey the fee-simple title."

Leaving the foregoing arguments on one side we neverthe-

less are of opinion that the bill must fail. The land in controversy had been withdrawn from the public domain by reservation at the time when the act of 1849 was passed, and the general words of that act must be read as subject to an implied exception, under the rule laid down in *Scott* v. *Carew*, 196 U. S. 100, 109, and the earlier cases there cited. The case is not one where the approval proceeded upon a mistake of fact with regard to a matter on which it was necessary that the Secretary should pass. See *Noble* v. *Union River Logging R. R. Co.*, 147 U. S. 165, 173, 174. The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. Therefore it was void upon its face. The only doubt is raised by the statute limiting suits by the United States to vacate patents to five years. Act of March 3, 1891, c. 561, § 8, 26 Stat. 1099. It may be that this act applies to approvals when they are given the effect of patents as well as to patents, which alone are named. In *United States* v. *Chandler-Dunbar Water Power Co.*, 209 U. S. 447, it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy but validated the patent. The doubt is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of that act.

But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last named act, it would be necessary at

least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact cannot be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

Bill dismissed.